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In The

Supreme Court of the United States

October Term, 1998

MORTON COMMUNITY UNIT SCHOOL DISTRICT NO. 709,

Petitioner,

vs.

J.M., a minor; M.M. and S.M., individually and as parents and next friends of J.M.; and the ILLINOIS STATE BOARD OF EDUCATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Individuals With Disabilities Education Act ("IDEA") requires school districts to provide their disabled students with not only direct educational services, but also "related services". However, IDEA specifically excludes "medical services" from its definition of related services. The question presented is:

Does IDEA, despite its exclusion of medical services, require a school district to provide and pay for a one-on-one nurse or other qualified person whose sole duty is to deliver life sustaining health care to a medically fragile student?

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The Petitioner, Morton Community Unit School District No. 709 respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered July 27, 1998.

Alternatively, the Petitioner respectfully requests that this Court issue a writ of certiorari and upon rendering its decision in *Cedar Rapids Community School District v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), *cert. granted,* 118 S. Ct. 1793 (U.S. May 18, 1998) (No. 96-1793), vacate the judgment below and remand to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of this Court's ruling in that case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 152 F.3d 583 and is reproduced in the Appendix at page 1a. The opinion of the United States District Court for the Central District of Illinois is reported at 986 F. Supp. 1112 and is reproduced in the Appendix at page 12a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment below on July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

20 U.S.C. § 1401 provides in pertinent part as follows:

> Except as otherwise provided, as used in this Act
> . . .

(22) Related Services

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

STATEMENT OF THE CASE

Morton Community Unit School District No. 709 [the "School District"] is located in and near the Village of Morton, Illinois. The School District serves approximately 3,000 students in grades kindergarten through twelve. J.M. resides with his parents M.M. and S.M. and attends classes within the School District. J.M. and his parents have lived in the School District since May of 1996 when J.M.'s father was transferred into the area in connection with his employment. The Illinois State Board of Education, acting through an appointed hearing officer, made the administrative determination which led to this litigation.

In its opinion below, the Court of Appeals accurately summarized the salient facts regarding J.M.'s condition:

> J.M. is a 14-year-old who suffers from severe congenital defects as a result of which he breathes

> through a tracheostomy tube (enabling him to breathe through an opening cut into his windpipe, rather than through his nose or mouth) with the intermittent aid of a portable ventilator system. The system requires continuous monitoring, as well as frequent adjustments and suctioning to maintain a smooth flow of oxygen, clear out plugs of mucous, and keep his lungs free from fluid buildups. Because he cannot close his eyes, he requires the application of an ointment to his eyes every hour to prevent corneal abrasions. His mobility is limited; he is normally wheelchair-bound, although he can walk a little with the aid of a walker. His growth has been stunted, and he has learning disabilities, as well as difficulty in speaking because of the tube in his neck. For him to be able to function in school — indeed, for him to *survive* the school day — he must be accompanied either by one of his parents, both of whom have been trained to attend to his needs, or by a nurse. The attendant must devote his or her full attention to J.M., and cannot assume any other duties. His lungs must be checked by stethoscope every couple of hours and suctioned every hour and a half or so, and the oxygen tank must be changed about as often; the rest of the time he must be watched to make sure that the ventilator does not become disconnected.

(App. at 3a).

The Court of Appeals also accurately summarized several important facts related to the dispute between the School District and J.M.'s parents:

> J.M.'s parents want the School District to pay for a nurse to attend J.M. while he is in school, which

> under the special education program that has been designed for him is four hours a day, four days a week, during the school season. The cost would be about $20,000 a year. There is no question that J.M. benefits educationally and psychologically from school, but he cannot attend unless he has an attendant at all times. In fact he has a nurse, paid for by his father's employee health plan; but there is a lifetime limit on the amount of benefits payable for J.M.'s care under the plan, and that is why the parents want the school district to pick up the tab for the nurse during school hours.

(App. at 3a).

Prior to moving into the School District, J.M. and his parents lived at another location in Illinois, within the Lisbon School District. From 1991 to 1996, the Lisbon School District placed J.M. at Marycrest School in Joliet, Illinois. While J.M. attended Marycrest School, he received nursing care both at school and while he was transported between home and school. Lisbon School District provided this nursing care at its expense. Shortly after moving to Morton, J.M.'s parents enrolled him as a student in the School District and at that time asked the School District to provide, at its expense, the nursing care which J.M. requires while he attends school and while he is in transit to and from school. The School District advised J.M.'s parents that the nursing services which he requires were medical services within the meaning of the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ["IDEA"]; consequently, the School District asserted that it had no obligation to provide the requested nursing services at its expense.

As authorized by IDEA, J.M.'s parents asked the Illinois State Board of Education to appoint a Level I hearing officer

to determine whether or not the School District was required to provide the requested nursing services at its expense. After conducting an evidentiary hearing, the Level I hearing officer entered an order directing the School District to provide the requested services at its expense. The School District appealed the decision of the Level I hearing officer to a Level II hearing officer also appointed by the Illinois State Board of Education. After the Level II hearing officer affirmed the decision of the Level I hearing officer, the School District sought review by filing a complaint with the United States District Court for the Central District of Illinois. The District Court exercised jurisdiction pursuant to 20 U.S.C. § 1415.

After the parties submitted cross-motions for summary judgment, the District Court entered an order directing the School District to provide the services requested by J.M.'s parents. In so doing, the District Court concurred with several prior decisions which adopt the so-called "bright line test". As applied by courts which adopt it, the bright line test provides that health care required by a disabled student while attending school falls within IDEA's medical services exclusion only if that care is actually provided by a licensed physician (App. at 24a). Under the bright line test all health care services required by a student while attending school other than those provided by a licensed physician must be provided by the school district at its expense regardless of the nature or extent of the services or the skill required of the person performing the service. The District Court also found that the provision of the nursing care which J.M. requires would not impose an undue burden on the School District. (App. at 37a-38a).

The School District appealed to the United States Court of Appeals for the Seventh Circuit. 28 U.S.C. § 1291 vested the Court of Appeals with jurisdiction to hear the appeal. The Court of Appeals declined to adopt the bright line test. However, the

court also noted that the $20,000 annual cost of providing nursing care to J.M. would be less than $7.00 per student and on that basis determined that the provision of such care did not constitute an "undue burden" on the School District (App. at 7a-8a). Ultimately the Court of Appeals concluded that:

> [W]e are at a loss to conceptualize or operationalize the distinction between related services of a medical nature that are covered by the IDEA and medical services that are not covered; and we are happy that the Supreme Court will be grappling with the issue. Catheterization is obviously a medical service, so after *Tatro* we know that the term "medical services" in the statute and regulation is not to be read literally. And for the reasons explained earlier, confining the term to the services rendered by a licensed physician would be arbitrary. So we know *something* about the scope of the term, but not enough to enable us to formulate a rule, and the Department of Education has not yet done so, as we have seen.

(App. at 8a). Based upon its professed inability to formulate a rule, the Court of Appeals deferred to the underlying decision of the administrative hearing officers and on that basis affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE IRRECONCILABLY CONFLICTS WITH DECISIONS OF FOUR OTHER CIRCUIT COURTS OF APPEALS REGARDING THE APPLICATION OF THE MEDICAL SERVICES EXCLUSION FOUND IN IDEA.

IDEA at 20 U.S.C. § 1400(d)(1)(A) requires school districts to provide their disabled students with a free appropriate public education. In order to fulfill their obligations under IDEA, school districts must provide their disabled students with not only direct educational services, but also "related services". Related services are defined at 20 U.S.C. § 1401(22) as including "medical services except that such medical services shall be for diagnostic and evaluation purposes only". The nature and extent of the medical services exclusion has been the subject of extensive litigation leading to decisions by six separate United States Courts of Appeals. Unfortunately, however, those decisions have resulted in two separate lines of cases which offer irreconcilably conflicting views regarding the meaning of the medical services exclusion.

In *Neely v. Rutherford County School District*, 68 F.3d 965 (6th Cir. 1995); *Detsel v. Board of Education of Auburn Enlarged City School District*, 820 F.2d 587 (2nd Cir. 1987) (per curiam), *cert. denied*, 484 U.S. 981 (1987); *Fulginiti v. Roxbury Township Public Schools*, 921 F. Supp. 1320 (D. N.J. 1996), *aff'd*, 116 F.3d 468 (3rd Cir. 1997); and *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1991) (per curiam), the United States Courts of Appeals for the Second, Third, Sixth and Ninth Circuits each interpreted the medical services exclusion. In three

of those cases, the Courts of Appeals considered the extent to which IDEA requires school districts at their expense to provide tracheostomy care which included continuous one-on-one care by a nurse. A review of the facts presented in the three cases involving tracheostomy care demonstrates a remarkable similarity to the facts in the case below.

In *Neely*, the Sixth Circuit Court of Appeals addressed a request made on behalf of Samantha Neely that the school district where she attended provide her with a nurse at the expense of the district. Like J.M. in the case below, Samantha suffered from a medical condition which required a tracheostomy and, consequently, suctioning to insure that secretions did not interfere with her ability to breathe. The number of times each day that Samantha required suctioning varied with the season and with her health. When she had a cold, she required suctioning approximately every 20 minutes. However, when in good health, she might require suctioning only after meals. The court ruled that the services requested on Samantha's behalf were excludable under IDEA as medical services.

In *Detsel,* the Second Circuit Court of Appeals affirmed a determination by the United States District Court for the Northern District of New York that the Auburn City School District was not required to provide tracheostomy care and maintenance to student Melissa Detsel, a seven year old who suffered from severe physical disabilities. As a result of her tracheostomy, Melissa required the application of a saline solution and the suctioning of mucus by either a licensed practical nurse or a registered nurse. The court relied on the medical services exclusion to conclude that the school district was not required to provide the nurse at its expense.

In *Fulginiti*, a United States district court decision affirmed without opinion by the Court of Appeals for the Third Circuit,

the court considered the case of Carissa Fulginiti. Carissa had a tracheostomy which required constant monitoring because her tracheostomy tube and air passages could become clogged. A nurse was required to be available to suction and clear her tracheostomy tube. The *Fulginiti* court, citing both *Neely* and *Detsel*, concluded that the services required by Carissa fell within the medical services exclusion and, therefore, that the school district was not required to provide those services at its expense.

In *Clovis*, the parents of a child hospitalized for treatment of a psychiatric condition contended that the school district in which they resided was required to cover the cost of that hospitalization as a related service. Utilizing the medical services exclusion, the Ninth Circuit Court of Appeals rejected this argument. While *Clovis* does not involve the care and maintenance of a tracheostomy, it does address the responsibility of a school district to pay for health care which, at best, had a minimal relationship to the educational responsibilities assigned to school districts by IDEA.

Several United States district courts have also concluded that the services of a one-on-one nurse required to provide tracheostomy care fall with the medical services exclusion and, therefore, are beyond the responsibility of the school district. In *Granite School District v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992), the court considered the case of a student who breathed through a tracheostomy tube and required suctioning to remove mucus from her tracheostomy. This and related needs required the constant presence of a least a licensed practical nurse to provide the necessary care. As in each of the other cases previously discussed, the court concluded that the requested services were medical services which need not be provided at the expense of the school district, rather than related services which must be provided. Similarly, the United States

District Court for the Western District of Pennsylvania considered this issue in *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987). The affected student in that case also suffered from multiple disabilities which required that she receive a tracheostomy tube and gastrostomy tube which in turn required the full-time presence of a nurse to monitor her condition and, when necessary, to suction mucus from her lungs. The court found that the nursing services requested on behalf of the student were medical services which need not be provided by the school district.

While the precise nature of the disability at issue in these cases differs from case to case, there is a remarkable degree of consistency in the impact of those various conditions on the needs of each of the affected children. In each case (with the exception of *Clovis*) the disability resulted in the need for a tracheostomy tube. In each case involving the care of a tracheostomy tube, the continuous presence of an individual trained in the provision of health care was required to constantly monitor both the student and the student's life sustaining equipment and, when necessary, to intervene to preserve the student's health through suctioning and other measures. In each of these cases the courts concluded that the services requested on behalf of the affected children fell within the medical services exclusion and, accordingly, that the school districts in question were not required to provide those services at the expense of the district.

Another line of cases beginning with *Cedar Rapids Community School District v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 1793 (U.S. May 18, 1997) (No. 96-1793), reaches a conclusion which is diametrically opposed to the conclusions reached by the Courts of Appeals in *Neely, Detsel, Fulginiti* and *Clovis*. The student who was the subject of *Garret F.*, like most of the students who were the subjects

of the other cases just discussed, required full-time care to attend to his tracheostomy and to provide other services necessary to maintain his health. Despite the factual similarities between *Garret F.* and the cases discussed above, the Eighth Circuit Court of Appeals ruled that the school district was obligated to provide the care required by the student. In so doing the Court relied on the so-called "bright line test" which, according to the Court, would apply the medical services exclusion only to the services of a licensed physician. The Court in *Garret F.* did not attempt to base its decision on factual distinctions between *Garret F.* and those cases discussed above which reached opposite conclusions. Indeed, the Eighth Circuit forthrightly disagreed with the interpretations of the medical services exclusion relied upon by the other courts which had reached opposite conclusions.

In *Garret F.* the Eighth Circuit Court of Appeals concluded that the bright line test upon which it so heavily relied was developed by this Court in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984). While the School District does not presume to tell this Court the meaning of its opinion in *Tatro*, the School District nevertheless suggests that the language in *Tatro* does not support the creation of the bright line test. Instead, the language utilized in that opinion appears to suggest that this Court was requiring school districts to provide intermittent care of a limited nature typically provided by a school nurse who has multiple responsibilities to all students in attendance at the school rather than the intense one-on-one care typically provided by a private duty nurse to students who require care and maintenance of their tracheostomies.

In the decision below, the Seventh Circuit Court of Appeals purports to reject the bright line test announced in *Garret F.* However, having rejected that test, the court promptly defers to the decision of an administrative hearing officer who not

only explicitly adopts the bright line test, but in so doing also relies heavily on the state level administrative decision which was the precursor to *Garret F.* Likewise, the District Court in *Skelly v. The Brookfield LaGrange Park School District 95*, 968 F. Supp. 385 (N.D. Ill. 1997) relies explicitly on the decision of the Eighth Circuit Court of Appeals in *Garret F.* to adopt the bright line test.

The conflict between decisions originating in the Second, Third, Sixth and Ninth Circuit Courts of Appeals on the one hand and the decisions originating in the Seventh and Eighth Circuit Court of Appeals on the other hand could hardly be more direct. That conflict creates enormous uncertainty for school districts throughout the nation, particularly in those circuits where the court of appeals having jurisdiction has not yet addressed this issue. For school districts under the jurisdiction of courts of appeals which have addressed this issue, the nature of the services which those school districts must provide to their disabled students under this federal statute of uniform applicability will vary with geography. Consequently, a school district in one jurisdiction is required to provide such nursing services to its students while a student with similar disabilities located in another jurisdiction would not receive those same services. Thus, the present conflicting interpretations thwart the Congressional intent that IDEA further an equitable allocation of resources and provide an equal educational opportunity for all disabled students. 20 U.S.C. § 1400(c)(7)(A).

The direct and irreconcilable conflicts between the courts which have considered the applicability of the medical services exclusion justifies a grant of certiorari in this case in order to resolve that conflict. However, if this Court resolves the existing conflict through its consideration of *Garret F.*, then the case below should be remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of this Court's ruling in *Garret F.*

II.

RESOLUTION OF THE CONFLICTING INTERPRETATIONS OF THE MEDICAL SERVICES EXCLUSION WOULD PROVIDE BENEFICIAL GUIDANCE TO NUMEROUS PUBLIC SCHOOL DISTRICTS THROUGHOUT THE NATION.

The conflicting interpretations of the courts of appeals regarding the extent of the medical services exclusion do not involve an obscure point of law with no practical significance. The significant number of reported cases in which courts have been called upon to interpret the medical services exclusion suggests that school districts regularly face the question of whether or not they must provide nursing services and other intensive health related care to disabled students. In fact, the court below noted with respect to the student who is the subject of this proceeding that

> J.M. belongs to the category of children known as "medically fragile" or "technology dependent" — children who in earlier times would not have lived to school age but who today are kept alive by drugs or medical appliances administered largely by nonphysicians.

(App. at 4a).

Certainly the obligation to provide continuous nursing care to medically fragile students creates a financial burden. In *Garret F.* the estimated annual expense for a single student was at least $27,000, and in the case below the services required by J.M. would cost the Morton School District approximately $20,000. The estimated cost of the services required by J.M. was based on J.M.'s current school week of four school days,

each four hours in length. That cost would of course increase or decrease as the length of time which J.M. spends in school increases or decreases. The court below attempted to minimize the significance of this expense by observing that the School District had 3,000 students and, therefore, the annual cost of nursing care would be less than $7.00 per student. The court concluded on that basis that providing nursing care to J.M. created no undue burden on the district. This analysis suggests a misunderstanding of the basis for the medical services exclusion. The obligation of a school district to provide services such as that required by J.M. cannot properly depend upon the size of either the district's budget or the district's student population. If the obligation of school districts to provide nursing care to medically fragile students depended upon such factors, then a student who resided in a large well funded district would be entitled to such services, while a student with identical disabilities who resided in a nearby rural school district with a small student population and inadequate financial resources could properly be denied those same services. Such a result would be inconsistent with the philosophy which underlies IDEA in general and the medical services exclusion in particular. If nursing care is a related service, it ought to be uniformly available to similarly situated children regardless of where they attend school. However, if, as seems consistent with the plain language utilized by Congress when it enacted IDEA, intensive nursing services such as those required by J.M. fall within the medical services exclusion, then school districts have no responsibility to provide those services regardless of how affordable those services are to a particular district. Accordingly, school districts throughout the nation require guidance as to the extent to which their obligations to disabled students depend on the resources available to the district.

The cost of providing life sustaining health care to students may well have been a motivating factor when Congress

excluded medical services from the list of related services which school districts are required to provide to disabled students during the educational process. However, of much greater importance is the fact that the provision of continuous life sustaining health care services lies well beyond the range of competence of most educators. Educators will typically have no basis on which to determine or evaluate either the competence of prospective employees who provide the type of health care required by medically fragile students or the performance of those individuals after they have been retained. By explicitly and without qualification freeing school districts from the obligation to provide disabled students with medical services other than for diagnosis and evaluation, Congress could not have intended, as the rulings in the case below and in *Garret F.* would appear to suggest, that school districts become health care providers of last resort for disabled students. The assertion made on behalf of J.M. and other students that school districts must provide life sustaining health care at the expense of the school districts raises an issue of nationwide importance which warrants resolution by this Court.

III.

THIS CASE SQUARELY PRESENTS AS AN ISSUE THE PROPER INTERPRETATION OF AN IMPORTANT FEDERAL STATUTE AND THEREFORE WOULD PRESENT AN OPPORTUNITY FOR THE RESOLUTION OF THAT ISSUE IN THE EVENT THAT THIS COURT RESOLVES *CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT v. GARRET F.* ON SOME BASIS OTHER THAN THE INTERPRETATION OF THE MEDICAL SERVICES EXCLUSION.

This Court has, of course, granted certiorari in *Garret F.* As noted by the United States Court of Appeals for the Seventh

Circuit in the decision below, the issues presented by *Garret F.* are quite similar to the issues presented in this case (App. at 2a). However, the student/respondent in *Garret F.* has asserted before this Court that the decision of the Eighth Circuit in that case should be affirmed because an independent basis for affirmation exists under state law. (Brief of respondent in *Garret F.*, Page 43). Such an argument is not available with respect to the case below. Under Illinois law, the School District is specifically excused from providing services such as those requested by J.M. The State of Illinois has implemented IDEA in part by regulation at Title 23 of the Illinois Administrative Code. In particular, 23 Ill. Admin. Code, § 226.562 prescribes the content of the individual education plan ("IEP") which under IDEA must be prepared for each disabled student:

> a) The IEP shall include, but is not limited to, the following:
>
> . . .
>
> 3) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs. *Related services shall not include* those services provided by licensed physicians, except for their diagnostic or evaluation services and consultation to education staff; licensed dentists except for diagnosis or evaluation and consultation to education staff; physician extenders; *registered or licensed practical nurses, except as they are performing the function of a school nurse; and other medical personnel*

> *involved in the provision of ongoing medical care.*

(Emphasis added). This regulation clearly and unequivocally provides that a school district in Illinois has no responsibility to provide nursing services to students, except when the nurse is performing the function of a school nurse. Evidence introduced in the case below demonstrates that in Illinois, at least, the function of a school nurse does not include the provision of extensive and exclusive medical care to a single student. Consequently, if *Garret F.* is decided on some basis other than this Court's interpretation of the medical services exclusion, then the important question of federal law raised below would nevertheless be squarely presented by this case.

CONCLUSION

This case presents an issue of great importance to school districts throughout the nation. The courts which have considered this issue have reached opposite conclusions on substantially similar facts. For these reasons, the School District respectfully requests that this Court grant its petition for writ of certiorari. Alternatively, the School District respectfully requests that this Court issue a writ of certiorari and upon rendering its decision in *Garret F.*, vacate the judgment below and remand this matter to the Seventh Circuit Court of Appeals for reconsideration in light of that decision.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 27, 1998

In the

United States Court of Appeals

For the Seventh Circuit

No. 97-3962

MORTON COMMUNITY UNIT SCHOOL DISTRICT NO. 709,

Plaintiff-Appellant,

v.

J.M., a minor, and M.M. and S.M., individually and as parents and next friends of J.M.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 97 C 1506—**Joe B. McDade**, *Judge*.

ARGUED MAY 15, 1998—DECIDED JULY 27, 1998

Before POSNER, *Chief Judge*, and FLAUM and DIANE P. WOOD, *Circuit Judges*.

POSNER, *Chief Judge*. The Individuals with Disabilities Education Act grants federal financial assistance for the education of disabled children to all states that agree (as all have) to provide such children with "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A); see also § 1412(a). The statute defines "related services" to mean "transportation, and such

developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, . . . social work services, . . . and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education." § 1401(22). We are quoting from the Act as it was amended in 1997, and this case arose earlier and may be subject to the previous version, but that is of no consequence as none of the amendments bears on the issue presented by the appeal.

The Department of Education has issued a regulation that largely repeats the statutory definition of related services, except that where the statute says "medical services, except that such medical services shall be for diagnostic and evaluation purposes only," the regulation says simply "medical services for diagnostic or evaluation purposes" and adds: "The term also includes school health services." 34 C.F.R. § 300.16(a). The regulation goes on, however, to define "medical services" as used in 20 U.S.C. § 1401(22) to mean "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services," and "school health services" to mean "services provided by a qualified school nurse or other qualified person." 34 C.F.R. §§ 300.16(b)(4), (11). This appeal requires us to consider the scope of the "medical services" exception to the obligation of a state to provide "related services" to disabled children. The issue is at present before the Supreme Court in a case quite similar to ours. *Cedar Rapids Community School District v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), cert. granted, 1997 WL 275042 (U.S. May 18, 1998). But it will not be argued until the Court's next Term; and the Court may base its decision on a ground that does not rule our case; so we have thought it best to go ahead and decide our case now.

Appendix A

J.M. is a 14-year-old who suffers from severe congenital defects as a result of which he breathes through a tracheostomy tube (enabling him to breathe through an opening cut into his windpipe, rather than through his nose or mouth) with the intermittent aid of a portable ventilator system. The system requires continuous monitoring, as well as frequent adjustments and suctioning to maintain a smooth flow of oxygen, clear out plugs of mucous, and keep his lungs free from fluid buildups. Because he cannot close his eyes, he requires the application of an ointment to his eyes every hour to prevent corneal abrasions. His mobility is limited; he is normally wheelchair-bound, although he can walk a little with the aid of a walker. His growth has been stunted, and he has learning disabilities, as well as difficulty in speaking because of the tube in his neck. For him to be able to function in school—indeed, for him to *survive* the school day—he must be accompanied either by one of his parents, both of whom have been trained to attend to his needs, or by a nurse. The attendant must devote his or her full attention to J.M., and cannot assume any other duties. His lungs must be checked by stethoscope every couple of hours and suctioned every hour and a half or so, and the oxygen tank must be changed about as often; the rest of the time he must be watched to make sure that the ventilator doesn't become disconnected.

J.M.'s parents want the school district to pay for a nurse to attend J.M. while he is in school, which under the special-education program that has been designed for him is four hours a day, four days a week, during the school season. The cost would be about $20,000 a year. There is no question that J.M. benefits educationally and psychologically from school, but he cannot attend unless he has an attendant at all times. In fact he has a nurse, paid for by his father's employee health plan; but there is a lifetime limit on the amount of benefits payable for J.M.'s care under the plan, and that is why the parents want the

school district to pick up the tab for the nurse during school hours. Two successive hearing officers held that the nursing care that J.M. needs at school is a related service within the meaning of the Act and not an excluded medical service. The district court agreed, precipitating this appeal by the school district.

Both parties take extreme positions. The parents argue (admittedly with support from *Garret F.*) that "medical services" are services rendered by a licensed physician; any other service that is necessary to enable a disabled child to benefit from an education is a nonexcluded related service that must be provided free of charge no matter what the character or expense of the service; their lawyer actually argued to one of the hearing officers that "the sky is the limit." On the view that the parents take, if for J.M. to benefit from education the school would have to build a bubble chamber for him and staff it with a team of technicians and registered nurses this service would not be a medical service as long as the on-site team did not include a licensed physician; if it did, presumably only his fee would be excluded from the school district's obligation to pay for related services.

This position is unrealistic about the nature of the modern provision of medical services, most of which, as a matter of economy and specialization, are provided by nurses, nurses' aides, paramedics, medical technicians, medical students, the patients themselves, and members of the patients' families, rather than by physicians. J.M. belongs to the category of children known as "medically fragile" or "technology dependent"—children who in earlier times would not have lived to school age but who today are kept alive by drugs or medical appliances administered largely by nonphysicians. See generally Ann Rozycki, "Related Services under the Individuals with Disabilities Education Act: Health Care Services for Students with Complex Health Care Needs," 1996 *Brigham Young U. Educ. & L.J.* 67.

The parents rely on the Department of Education's regulation defining medical services as those provided by a physician. Read in its most natural way, the regulation seems merely a reminder that diagnostic services, even when provided by a physician, are not excluded medical services. It does not appear to be a comprehensive definition of medical services. Cf. *Board of Education v. Rowley*, 458 U.S. 176, 188 (1982). But in an amicus curiae brief opposing (unsuccessfully) the grant of certiorari in the *Garret F.* case, the Solicitor General represented to the Supreme Court that it is the position of the Department of Education that "supportive services not provided by a licensed physician may be required if they are necessary to aid a child with a disability to benefit from special education." Brief for the United States as Amicus Curiae in *Cedar Rapids Community School District v. Garret F.*, No. 96-1793, O.T. 1997, p. 16 n. 9 (Apr. 22, 1998). In the words "may be" and in the further statement that "each situation must be examined on a case-by-case basis," *id.*, the Department's position as paraphrased in the Solicitor General's brief falls short of declaring that the services involved in our bubble hypothetical should be deemed "related" but not "medical." The general tenor of the brief, however, is that the cost and character of the services are irrelevant; as long as the services are genuinely necessary to enable the disabled child to benefit from an education and cannot be provided outside of school hours, the school district must pick up the tab. See, e.g., *id.* at 18-19.

The interpretations that the Department of Education places on its own regulation are entitled, of course, to some measure of judicial deference, *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Skandalis v. Rowe*, 14 F.3d 173, 177 (2d Cir. 1994), even when expressed informally, in a letter or a brief. *Id.* at 179; see *Martin v. OSHA*, 499 U.S. 144, 157 (1991); *Auer v. Robbins*, 117 S. Ct. 905, 911 (1997); *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996). But the Department's interpretation of "medical services," even as

described by the Solicitor General, is not so definite or precise as to rule the bubble hypothetical. Moreover, the description is inaccurate. The opinion letters are evasive. Typical is *Letter to Anderson*, 24 Ind. Dis. Educ. L. Rep. 180 (Feb. 22, 1996), which states: "The determination as to whether a school district must provide one-to-one nursing services [i.e., a full-time attendant] to a student with a disability in a public school setting must be made on a case-by-case basis in light of the particular facts and circumstances involved. For this reason, [the Department of Education] refused to express any view as to whether such services are a required related service under special education laws." The letter goes on to remark noncommittally that "if the care required is continuous, courts, relying on the private duty aspect of the services, generally have held that the service is an excluded medical service." *Id.*

The school district takes an extreme position on the other side of the issue. It argues that the only health-related services that are not medical services within the meaning of the Act are services traditionally provided by the school nurse. It relies for this position on the references in the Department of Education's regulation to school health services and on the Supreme Court's decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), which held that catheterization of a child with spina bifida by a school nurse, a procedure that took a few minutes every few hours, was not a medical service within the meaning of the statute (a materially identical predecessor to the IDEA). The fallacy in the school district's reliance on the regulation and the *Tatro* decision is the assumption that because services provided by the school nurse are not deemed medical for purposes of the statute, any service that the school nurse can't provide must be deemed medical. That is a non sequitur. And anyway if J.M.'s parents, who are not medical professionals, can be trained to attend to J.M.'s needs, so can the school nurse. The only reason the school district won't permit her to provide the necessary services

to J.M. is that it would take 16 hours of her work week, leaving her with insufficient time to perform the other duties of her job. In effect, the school district is arguing for a rule that would make the child's entitlement to in-school health-maintenance services depend on the amount of spare time a particular school's nurse had in relation to the amount of time required by the school's disabled students. That would make J.M.'s right to attend school at the state's expense turn on the size of the school's nursing staff and the number of other disabled students in the district and the nature of their disabilities.

What the school district is groping for, what several courts have flirted with, see *Neely v. Rutherford County School*, 68 F.3d 965, 972-73 (6th Cir. 1995); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 153-54 (4th Cir. 1991) (per curiam); *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635, 639-44 (9th Cir. 1990) (per curiam), and what *Garret F.* and *In re Smith*, 926 F.2d 1027, 1028 (11th Cir. 1991) (per curiam), have rejected, is a defense of undue burden. Our bubble-chamber hypothetical makes this quest an understandable one. The IDEA does not contain an explicit defense of undue burden, as the Americans with Disabilities Act does, 42 U.S.C. § 12112(b)(5)(A); *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678, 682 (5th Cir. 1996), but it can be argued that one is implicit in the statutory concepts of an "appropriate" education and "related" services. Perhaps at some point the expense of keeping a disabled child alive during the school day is so disproportionate to any plausible educational objective for the child that the expense should not be considered a component of an appropriate education for a severely disabled child or a service reasonably related to such an education. So at least the cases that we have cited suggest. We need not take sides. The school district has made no effort to show that the expense of a full-time nurse for J.M. would be undue in relation to the other calls on the district's budget. The district has more than 3,000

students, so that the annual cost of such a nurse would be less than $7 per student. Of course there may be other severely disabled children in the district, so that the cumulative expense of the kind of service that J.M. requires could be much more than $7 per student. But the district did not present any evidence concerning other severely disabled children in the district, and perhaps there are none. Nor did it attempt a breakdown of the actual cost of the nursing care that J.M. needs between the federal government, which funds IDEA in part, the State of Illinois, which also funds it in part, see, e.g., 105 ILCS 5/14-12.01, and the school district itself, see 23 Ill. Adm. Code §§ 226.10, 226.20, which is the only entity complaining about the burden. There is evidence that less than 20 percent of "special education" expenditures by the school district are funded locally. So, for all that appears, the financial burden on the district of the class of expenditures represented by the expense of hiring a nurse to attend J.M. would be slight.

With undue burden out of the picture, we are at a loss to conceptualize or operationalize the distinction between related services of a medical nature that are covered by the IDEA and medical services that are not covered; and we are happy that the Supreme Court will be grappling with the issue. Catheterization is obviously a medical service, so after *Tatro* we know that the term "medical services" in the statute and regulation is not to be read literally. And for the reasons explained earlier, confining the term to services rendered by a licensed physician would be arbitrary. So we know *something* about the scope of the term, but not enough to enable us to formulate a rule, and the Department of Education has not yet done so, as we have seen. In such a case we prudently retreat to the principle of judicial deference to the factual, judgmental, or discretionary decisions of the front-line administrative decision-makers, in this case the two hearing officers, both of whom found that the services which J.M. requires are related but not

medical. The deferential approach is not inconsistent with the statement in *Tatro* that "this case . . . presents the *legal* question of a school's substantive obligation under the 'related service' requirement." 468 U.S. at 890 n. 6 (emphasis added). There was a clear-cut legal question in that case—whether school nursing fell under the "medical services" exclusion. Earlier the Court had suggested deference to the reasonable judgments of the administrative tribunals established under the Act, *Board of Education v. Rowley, supra,* 458 U.S. at 205-06, and that is the approach we have taken as well. E.g., *Monticello School District No. 25 v. George L.,* 102 F.3d 895, 905-06 (7th Cir. 1996); see also *City of Chicago v. International College of Surgeons,* 118 S. Ct. 523, 532 (1997) (dictum).

Only superficially is the deferential approach inconsistent with the cases that say that we review the district court's determinations under IDEA de novo, that is, without any deference to that court. *Board of Education v. Illinois State Board of Education,* 938 F.2d 712, 716 (7th Cir. 1991); *Board of Education of Murphysboro v. Illinois State Board of Education,* 41 F.3d 1162, 1166 (7th Cir. 1994); *Heather S. v. Wisconsin,* 125 F.3d 1045, 1053 (7th Cir. 1997); *Doe v. Board of Education,* 115 F.3d 1273, 1276-77 (7th Cir. 1997); *Lachman v. Illinois State Board of Education,* 852 F.2d 290, 293, 297 (7th Cir. 1988). Judicial review under IDEA is multitiered. There is first review by the district court of the hearing officers' decisions, and then review by this court of the district court's decision. When the district court does not receive additional evidence—when its only role is that of a reviewing court—its rulings however characterized are necessarily rulings of law, which we indeed review de novo, just as we review a grant of summary judgment de novo. See. e.g., *Hunger v. Leininger,* 15 F.3d 664, 669 (7th Cir. 1994); *Law v. Medco Research, Inc.,* 113 F.3d 781, 783 (7th Cir. 1997). The fact that the district court may take evidence (20 U.S.C. § 1415(e)(2)) as well as acting solely as a reviewing body complicates the issue of appellate re-

view, see, e.g., *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384 (6th Cir. 1998), but is not a problem here; and so we are left with the question what standard the district court and therefore we should use in reviewing the hearing officers when no additional evidence is introduced in the district court.

The answer given by our cases, such as *Monticello School District No. 25 v. George L.*, *supra*, 102 F.3d at 905-06, and *Board of Education of Murphysboro v. Illinois State Board of Education*, *supra*, 41 F.3d at 1167, is that the courts (the district court and then this court, using the same standard) should give due deference to the hearing officers' judgments. The upshot, as explained in *Board of Education v. Illinois State Board of Education*, *supra*, 938 F.2d at 715-16, is that the district court must give "'due weight' to the results of [the administrative] proceedings, bearing in mind not 'to substitute [its] own notions of sound educational policy for those of the school authorities,'. . . [but] at the Court of Appeals level, we view the question of whether an IEP is adequate and appropriate as a mixed question of law and fact, and thus review the district court's ultimate determination *de novo*." Now it is true that the very next sentence of the opinion from which we have just quoted blurs the distinction that we are trying to make by stating that "in the absence of a mistake of law, the district court's answer to this mixed fact/law question is only reviewable for clear error." *Id.* at 716, citing *Roland M. v. Concord School Committee*, 910 F.2d 983, 990-91 (1st Cir. 1990). This proposition makes sense if the district court takes evidence, but if it does not—if its role is purely that of a reviewing court—the basis for deference is obscure. We need not try to resolve the issue here. One thing, at least, is clear, and it decides this case: we do defer, though of course not abjectly, to the view of the hearing officers as to what services a disabled child is entitled to under the IDEA. The services that J.M. requires are time-consuming but do not require a high degree of expertise or any expenses of

medical treatment as such—the cost of the tracheostomy supplies, ventilator system, ointment, wheelchair, walker, and other equipment and drugs that J.M. requires are not expenses for which the parents are seeking reimbursement from the school district. At some point the efforts required to maintain a medically fragile, technology-dependent child in school may cross the blurry line that separates ancillary educational services from purely medical interventions, but it was not unreasonable for the hearing officers to conclude that the services that J.M. requires do not cross the line and we are therefore bound by that conclusion.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—7-27-98

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED OCTOBER 23, 1997

MORTON COMMUNITY UNIT SCHOOL DISTRICT NO. 709, Plaintiff,

v.

J.M. a minor; M.M. and S.M., individually and as parents and next friends of J.M., and the Illinois State Board of Education, Defendants.

No. 97-1056.

United States District Court,
C.D. Illinois.

Oct. 23, 1997.

* * *

McDADE, District Judge.

Before the Court are Defendants' Motion for Preliminary Injunction [Doc. # 14], and cross motions for summary judgment. [Docs. 17 & 22]. For the reasons set forth below, Defendants' Motion for Summary Judgment is GRANTED, Plaintiff's Motion for Summary Judgment is DENIED, and Defendants' Motion for Preliminary Injunction is DENIED as MOOT.

BRIEF OVERVIEW

On September 23, 1996, a Level I Hearing Officer for the Illinois State Board of Education ordered Plaintiff, the Morton

Community Unit School District ("Morton School District"), to identify and contract with a qualified individual in order to provide health related services to Defendant, J.M., a minor. (Administrative Record ("R.") at p. 793-799). On January 23, 1997, a Level II Reviewing Officer for the Illinois State Board of Education affirmed. (R. at p. 1-28). Despite the directive handed down by the Illinois State Board, the Morton School District has refused to provide the services for J.M. (Doc. # 25 at ¶ 37). Rather, in the instant appeal of the administrative decision, Plaintiff argues that the State Board erred and consequently seeks judicial review of the administrative decision pursuant to 20 U.S.C. § 1415(e)(2) of the Individuals With Disabilities Education Act ("IDEA").

BACKGROUND

J.M. is a 14 year old who suffers from Noonan's Syndrome, chronic fibrotic lung disease, cystic hygroma, and receives treatment for corneal abrasions (hereinafter collectively referred to as J.M.'s "disabilities") (Doc. # 25 at ¶ 1). J.M. uses a portable ventilator system known as an oxygen trach collar to maintain respiratory functioning. (Doc. # 25 at ¶ 17). In addition, J.M. has a tracheostomy and gastrostomy.[1] (Doc. # 18 at ¶ 7; Doc. # 25 at ¶ 18).

Because of his disabilities, J.M. requires a "pediatric nurse" or "trained" individual to monitor him throughout the day.

1. A "tracheostomy" is a "[s]urgical creation of an opening into the trachea through the neck, for insertion of a tube to facilitate the passage of air to the lungs, or evacuation of secretions." A "gastrostomy" is a "[s]urgical creation of an artificial gastric fistula." A "fistula" is "[a]n abnormal passage . . . usually between two internal organs, or leading from an internal organ to the surface of the body [.]" See Dorland's Illustrated Medical Dictionary, 24th Edition (1965).

(Doc. # 25 at ¶¶ 13, 14; Doc. # 18 at ¶ 8). During the school day, J.M. requires suctioning of his airways, application of an eye ointment every hour, and monitoring of his portable life support equipment. (Doc. # 25 at ¶ 28). It is undisputed that J.M.'s parents were able to provide the above services after one week of training at a hospital. (Doc. # 25 at ¶ 13; Doc. # 27 at ¶ 13).

The Morton School District describes J.M.'s needs somewhat differently:

> J.M. is ventilator dependent with a tracheostomy, gastrostomy and is dependent in the activities of daily living. J.M. requires either a skilled pediatric nurse or one of his parents with him at all times. J.M. requires a skilled pediatric nurse with him while he attends school. The duties of the skilled pediatric nurse . . . would include assessment of J.M.'s respiratory status with appropriate interventions (suctioning, trach care or replacement, oxygen administration, etc.), administration of medication (requires hourly eye lubricant to prevent corneal abrasions), administration of nebulized breathing treatments, monitoring of equipment function with troubleshooting as indicated, and assistance with activities of daily living (feeding, toileting, and transfers).

(Doc. # 18 at ¶¶ 6-10).

J.M. attended Maycrest School in the Lisbon Community Consolidated Grade School District for approximately five years. (Doc. # 25 at ¶¶ 3-6). The Lisbon School District

contracted with a nurse, Ms. Faith Read, to provide the health services for J.M. while he attended school. (Doc. # 25 at ¶ 30). Ms. Read was also contracted by the Lisbon District to aid in J.M.'s transportation to and from school. (Doc. # 25 at ¶ 31).

In May of 1996, J.M. and his parents moved to the Morton Community Unit School District when his father was transferred as a result of his employment with Caterpillar Incorporated. (Doc. # 25 at ¶ 2). When J.M. enrolled in school, his parents asked the Morton School District to provide, at its own expense, the services of a trained individual to monitor J.M. during the school day. (Doc. # 23 at p. 2). However, after considering J.M.'s request, the School District determined that it was under no obligation to provide the health services. (Doc. # 18 at ¶ 5). The School District refused to provide the health services not because of the potential financial burden on the District:[2] (Doc. # 25 at ¶ 37), rather, the District has refused because the District believes that it is prohibited from doing so by federal law. (Doc. # 25 at ¶ 37).

In response to the School District's refusal, J.M. sought review of the decision before the Illinois State Board of Education. (Doc. # 19 at p. 1). Two successive administrative hearings were held. (Doc. # 19 at p. 1- 2). The issue at both hearings was singular and the same: whether the services required by J.M. to attend school were "related services" within the meaning of the IDEA. (Doc. # 25 at ¶ 43). After finding that the services required by J.M. were in fact "related services,"

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2. Colleen Harris, the Director of Special Education for Morton, developed cost figures that estimated the cost of contracting with a nurse for J.M. to be $20,000 per school year. (Doc. # 25 at ¶ 35). The Morton School District in 1996 had a total budget of $16.8 million dollars, and an enrollment of 2915 students. (Doc. # 25 at ¶ 38).

the Illinois State Board ordered the School District to identify and contract with a qualified individual to provide the necessary health related services to J.M. while he attends school. (Doc. # 25 at ¶ 42). The School District has refused to provide the health services for J.M. until this Court reviews the administrative decision pursuant to 20 U.S.C. § 1415(e)(2). (Doc. # 1 at p. 1).

STANDARD OF REVIEW

The standard of judicial review under the IDEA differs from that governing the typical review of a motion for summary judgment. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1052 (7th Cir.1997); *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir.1994). The IDEA dictates that the district court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). When neither party has requested that the district court hear additional evidence, "there is nothing new presented to the district court; thus '[t]he motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record.' " *Heather S.*, 125 F.3d at 1052.

Despite being termed summary judgment, the district court's decision is based on the preponderance of the evidence. 20 U.S.C. § 1415(e)(2); *Hunger*, 15 F.3d at 669. The party challenging the outcome of the state administrative decision bears the burden of proof. *Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ.*, 938 F.2d 712, 716 (7th Cir.1991). In reviewing the administrative record, the

district court is required to give "due weight" to the results of the administrative proceedings and not "to substitute [its] own notions of sound education policy for those of the school authorities," whose decision it is reviewing. *Heather S.*, 125 F.3d at 1052 (*quoting Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 3050-51, 73 L.Ed.2d 690 (1982)).

LEGAL ANALYSIS

The IDEA requires a school district to provide, at its own expense, "related services" and/or "school health services" to eligible disabled children, however, the Act does not require a school district to expend funds on "medical services" unless the "medical services" are rendered for the purpose of "diagnosis" or "evaluation." *See* 20 U.S.C. § 1401(a)(17). Thus, the issue in the instant action is simple: are the health services that J.M. requires excluded "medical services" or included "related services" within the meaning of the IDEA? The Illinois State Board of Education determined that J.M. required "related services." The Morton School District argues that the State Board erred because J.M. requires "medical services." As the party challenging the outcome of the state administrative decision, the Morton School District bears the burden of proof. *See Heather S.*, 125 F.3d at 1052.

Before considering the arguments raised by the Morton School District, the Court will first set forth the statutory and regulatory framework that governs this action. Because the Seventh Circuit has not addressed the issue raised here, *Skelly v. The Brookfield Lagrange Park School District 95*, 968 F.Supp. 385, 392 (N.D.Ill.1997), the Court will also describe the manner in which other federal courts have resolved similar disputes.

Appendix B

The Individuals with Disabilities Education Act, which amended the Education of the Handicapped Act, was enacted in 1990 for the congressional purpose articulated in the IDEA:

> (c) It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title a free appropriate public education which emphasizes *special education* and *related services* designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. § 1400(c) (emphasis added). The statutory definition of "special education" is:

> (16) The term "special education" means specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including —
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
>
> (B) instruction in physical education.

20 U.S.C. § 1401(a)(16) (emphasis added). The statutory definition of the phrase "related services," which is at dispute here, is:

Appendix B

> (17) The term "related services" means transportation, and such development, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and *medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(a)(17) (emphasis added).

A "free appropriate public education," the primary concept of the IDEA and its statutory predecessor, is defined as:

> (18) The term "free appropriate education" means special education and related services that —
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

Congress in 20 U.S.C. § 1416, specifically authorized the withholding of federal funding by the Secretary of Education for any failure to comply with these laws. *See Skelly v. The Brookfield Lagrange Park School District 95*, 968 F.Supp. 385, 391 (N.D.Ill.1997). Congress conferred federal court jurisdiction to resolve IDEA law suits under 20 U.S.C. § 1515(e). *Id.* The Secretary of the Department of Education, pursuant to the power conferred in 20 U.S.C. § 1417(b), promulgated various federal regulations that are published in the 34 Code of Federal Regulations, Parts 300-301. *Id.* In accordance with standards of appropriate judicial interpretation of statutory and regulatory law, these regulations are to be accorded deference if they are considered reasonable interpretations of congressional intent. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

34 C.F.R. § 300.16(a) provides:

> the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling

> services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health' services, social work services in schools, and parent counseling and training.

34 C.F.R. § 300.16(b)(4) provides:

> *"Medical Services" means services provided by a licensed physician* to determine a child's medically related disability that results in the child's need for special education and related services. (emphasis added)

34 C.F.R. § 300.16(b)(11) provides:

> "School health services" means services provided by a qualified school nurse or other qualified person.

In *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984), the United States Supreme Court considered whether the needs of a handicapped child were "medical services" or "related services" within the meaning of the IDEA. There, an eight-year old with spina bifida, Amber Tatro, required bladder catheterization every three to four hours while she attended school. *Id.* at 885, 104 S.Ct. at 3373. The Court described the procedure required by Amber as follows:

> In accordance with accepted medical practice, clean intermittent catheterization (CIC), a procedure involving the insertion of a catheter into the urethra to drain the bladder, has been prescribed. The procedure is a simple one that may be performed in

> a few minutes by a layperson with less than an hour's training. Amber's parents, babysitter, and teenage brother are all qualified to administer CIC, and Amber soon will be able to perform this procedure herself.

Id. at 885, 104 S.Ct. at 3373.

The Supreme Court held that Amber was entitled to have the Irving Independent School District provide the catheterization as a "related service" under the IDEA. *Id.* at 891-95, 104 S.Ct. at 3376-78. The Supreme Court determined that the catheterization procedure, though medically prescribed, was not a "medical service" excluded from the school district's statutory obligation. *Id.* at 891, 104 S.Ct. at 3376. The Court explained:

> We also agree with the Court of Appeals that provision of CIC is not a "medical servic[e]," which a school is required to provide only for purposes of diagnosis or evaluation. *See* 20 U.S.C. § 1401(17). We begin with the regulations of the Department of Education, which are entitled to deference. [ ] The regulations define "related services" for handicapped children to include "school health services," 34 C.F.R. § 300.13(a) (1983), which are defined in turn as "services provided by a qualified school nurse or other qualified person," § 300.13(b)(10). "Medical services" are defined as "services provided by a licensed physician." § 300.13(b)(4). *Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a "related service" are not subject to*

> *exclusion as a "medical service," but that the services of a physician are excludable as such. This definition of "medical services" is a reasonable interpretation of congressional intent.*

Id. at 892, 104 S.Ct. at 3377. (emphasis added). The Court further explained:

> The regulations actually define only those "medical services" that are owed to handicapped children: "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services." 34 C.F.R. § 300.13(b)(4) (1983). Presumably this means that "medical services" not owed under the statute are those "services by a licensed physician" that serve other purposes.

Id. at 892 n. 10, 104 S.Ct. at 3377 n. 10. Finally, in dicta, the Court stated:

> Although Congress devoted little discussion to the "medical services" exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove *unduly expensive* and beyond the range of their competence. From this understanding of congressional purpose, the Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services.

Id. at 892-93, 104 S.Ct. at 3377 (emphasis added).

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In interpreting the *Tatro* decision, some federal courts have held that the Supreme Court developed a bright-line rule that declares that a handicapped child is entitled to health services under the IDEA as long as the services are provided by an individual other than a physician. *See Skelly*, 968 F.Supp. at 394; *see also Cedar Rapids Community School District v. Garret F.*, 106 F.3d 822 (8th Cir.1997).

In *Garret F.*, the defendant, Garret, a minor, was quadriplegic and ventilator dependant. *Id.* at 823. The Eighth Circuit described Garret's needs as follows:

> During the School day, Garret requires a personal attendant within hearing distance of him at all times to see to his health care needs. Garret requires urinary bladder catheterization about once a day, suctioning of his tracheostomy as needed, food and drink on a regular schedule, repositioning, ambu bag administration if the ventilator malfunctions, ventilator setting checks, observation for respiratory distress or autonomic hyperreflexia, blood pressure monitoring, and bowel disimpactation in cases of autonomic hyperreflexia.

Garret F., 106 F.3d at 823. In finding that the services that Garret required were "related services" within the meaning of the IDEA, the Eighth Circuit Court of Appeals explained:

> In *Tatro*, the Supreme Court established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or

> qualified layperson are not. Regardless of whether we agree with this reading of the statute and the regulations, we are bound by the Supreme Court's holding. . . . Here Garret's services are not provided by a physician, but rather a nurse. Thus, based on *Tatro*, the services are not medical services, but rather, school health services or supportive services, both of which meet the definition of related services which the district must provide.

Garret F., 106 F.3d at 825. (citations omitted).

In *Skelly*, Eddie Skelly, was a four-year old boy who suffered from a rare neurological-muscular disease known as Pelizaeus-Merzbacher Leukodystrophy ("PMD"). 968 F.Supp. at 386. As a result of PMD, Eddie received a tracheostomy tube which was not used for breathing but rather as a "pulmonary toilet." *Id.* at 386. Occasionally, the tracheostomy tube would need to be suctioned if Eddie was unable to cough up secretions. *Id.* at 389. The school district in *Skelly* argued that Eddie required "medical services" and that, therefore, the district was under no obligation to pay for the services under the medical services exclusion in the IDEA. *Id.* at 387.

Judge Holderman of the United States District Court in the Northern District of Illinois, following *Garret F.*, found that the suctioning procedure required by Eddie did not have to be performed by a physician and thus Eddie's condition did not require excluded "medical services" within the meaning of the IDEA. *Id.* at 394-95. Judge Holderman stated:

> The suctioning of a tracheostomy tube is a common, standard maintenance procedure that need not be

> performed by a physician and therefore is not an excluded "medical service" under 20 U.S.C. § 1401(a)(17), even if a nurse is required to perform the procedure. Consistent with the testimony [in the record], however, it appears that Eddie's tracheostomy suctioning need not be performed by a licensed nurse but merely a properly trained individual.

Skelly, 968 F.Supp. at 395.

Relying on dicta in the Tatro decision, *see Garret* F, 106 F.3d at 825, other federal courts have held that *Tatro* stands for the proposition that a handicapped child is not entitled to health services if the allocation of the services places an "undue burden" on the particular school district. *See Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir.1995); *Detsel v. Board of Education of Auburn City School District*, 820 F.2d 587 (2d Cir.1987); *Fulginiti v. Roxbury Township Public Schools*, 921 F.Supp. 1320 (D.N.J.1996) *affirmed* 116 F.3d 468 (3d Cir.1997); *Granite School District v. Shannon M.*, 787 F.Supp. 1020 (D.Ut.1992); *Bevin H. v. Wright*, 666 F.Supp. 71 (W.D.Pa.1987).

In *Neely*, Samantha Neely, the student/plaintiff suffered from Congenital Central Hypoventilation Syndrome which required a tracheostomy. 68 F.3d at 967. Samantha also required suctioning to insure that secretions did not block her tracheostomy. *Id.* Accordingly, Samantha needed a well trained individual to be readily accessible to her while she attended school. *Id.* The Sixth Circuit held that the services required by Samantha were inherently burdensome to the school district and excludable as medical services. *Id.* at 971-73. The Court of Appeals explained:

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> The district court found the services in question to be "medical in nature." We believe the better interpretation of *Tatro* to be that a school district is not required to provide every service which is "medical in nature." The services at issue in *Tatro* could be provided by someone other than a nurse and a layperson, with minimum training, could provide it. *Tatro*, 468 U.S. at 894, 104 S.Ct. at 3378. It was, therefore, the kind of service that was not *unduly expensive or beyond the range of the school system's competence*. *Id.* at 892, 104 S.Ct. at 3377. We believe it is appropriate to take into account the risk involved and the liability factor of the school district inherent in providing a service of a medical nature such as is involved in this controversy. . . . [W]e agree that the services requested by Samantha are inherently burdensome . . . The undue burden derives from the nature of the care involved . . . The care requested by Samantha falls within the "medical services" exclusion of the IDEA.

Neely, 68 F.3d at 971, 973. (emphasis added).

In *Detsel*, Melissa Detsel had a tracheostomy and required the application of a saline solution and the suctioning of mucus. 637 F.Supp. 1022, 1023 (N.D.N.Y.1986). Melissa also required the services of a trained individual to monitor her throughout the school day. *Id.* There, the district court held that the School District was not obligated to provide the services required by Melissa. *Id.* at 1027. The district court explained:

> It is clear that the Supreme Court considered the extent and nature of the services performed in the

Tatro decision. Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant monitoring is required in order to protect Melissa's very life. The record indicates that the medical attention required by Melissa is beyond the competence of a school nurse. A specially trained individual is required. Preferably a health professional. The Supreme Court in *Tatro* reasoned that the regulations had permissibly interpreted § 1401(17) in providing that school nursing services did not fall within the medical services exclusion. In so doing, the Court stated that Congress could well have decided to exclude costly and complicated services. . . . Indeed, the Court noted that "children with serious medical needs are still entitled to an education. For example, the Act specifically includes instruction in hospitals and at home within the definition of special education.' " This dictum is in line with the Court's earlier decision in [*Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] wherein it held that Congress did not intend to "maximize each handicapped child's potential." [*Rowley*, 458 U.S. at 199, 102 S.Ct. at 3047, (holding that EAHCA, the predecessor to IDEA, did not require provision of a sign language interpreter for a deaf child enrolled in public school)].

In light of the foregoing, the court holds that the Education of the Handicapped Act (the predecessor to the IDEA) does not require the defendant school district and board of education to

> provide a severely physically disabled child with [constant] in-school nursing care.

Detsel, 637 F.Supp. at 1026-27. The Second Circuit Court of Appeals affirmed. *Detsel*, 820 F.2d at 588.

In *Fulginiti*, Carissa Fulginiti required constant monitoring while she attended school because her tracheostomy tube and air passages could become clogged with saliva and mucus. 921 F.Supp. at 1320. When necessary, a suctioning device was used to clear the blockages. *Id.* In describing Carissa's needs, the district court stated:

> To participate in and benefit from public education, Carissa requires extensive "related services:" she must receive special education and speech, physical and occupational therapy, special transportation and nurse supervision. Most significantly, the supervision of a full-time nurse or another specially trained person is required during her transportation to and from school, and while there, to monitor her tracheostomy tube and provide suctioning when necessary. . . . Put simply, if Carissa is to attend school, someone must be with her constantly to monitor her air passage and maintain their clarity.

Fulginiti, 921 F.Supp. at 1321. Citing, *inter alia*, *Neely*, the district court granted summary judgment in favor of the Roxbury Township Public Schools. The district court stated:

> [T]he application of the determinative reasoning of all cases which have dealt directly with factual circumstances similar to the present controversy

> compels the conclusion of the court that to require the present Board to assume the responsibility amounts to an *undue burden*.

Fulginiti, 921 F.Supp. at 1325. (emphasis added). The district court was subsequently affirmed by the Third Circuit Court of appeals in an unpublished order. *See Fulginiti v. Roxbury Township Public Schools*, 116 F.3d 468 (3d Cir.1997) (table); *see also Granite School District v. Shannon M.*, 787 F.Supp. 1020 (D.Ut.1992) (held constant nursing/tracheostomy care required by handicapped student fell within "medical services" exclusion to the IDEA and thus, was not "supportive" service that school had to provide as a matter of federal law); *Bevin H. v. Wright*, 666 F.Supp. 71 (W.D.Pa.1987) (held that nursing services required were so varied, intensive and costly as not to be properly includable as "related services" which school district was responsible to provide to child without charge).

ADMINISTRATIVE HEARINGS

The Level I Hearing Officer made the following findings of fact and conclusions of law:

> 1. J.M. is eligible for special education. His most recent IEP [Individualized Education Plan] lists Other Health Impairment as his primary disability category and Speech/Language as a secondary category. No one disputed either his eligibility or the category designations.

> 2. J.M. requires extensive health-related services and cannot attend school without these services. Moreover, the services he requires are extensive and

> complex enough that they can be performed only by a trained individual. The services also require greater attention than can be provided by a school nurse who is responsible for the needs of several other children in the school or district. Individual treatment is required.
>
> 3. J.M. was educated for approximately five years [at Maycrest School in the Lisbon Community Consolidated Grade School District]. During that time he received the services sought by the petitioner in this case. District funds provided those services at least part of the time that J.M. was enrolled in the other district. J.M. made social and educational gains in the other district. . . .

(R. at 795). Citing *Tatro*, the Level I Hearing Officer concluded that since the record established that J.M. only required the assistance of a "nurse or another qualified person" and not a physician, J.M. did not require "medical services" within the meaning of the IDEA and that, therefore, the School District was required to provide a qualified nurse for J.M. at its own expense. (R. at 797).[3]

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3. The Level I Hearing Officer stated:

> Although the language of the *Tatro* decision is primarily limited to discussion of school nursing services and CIC, my reading of the decision supports the interpretation that "medical" services require the expertise and knowledge of a physician, while "school health" services can be performed by a school nurse or other qualified person.

(R. at p. 796).

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The Level I Hearing Officer factually distinguished the instant case from *Detsel, Neely, Fulginiti, Granite,* and *Bevin H.*, since, in his view, the needs of the children in those cases were much more extensive than the needs of J.M. (R. at p. 796). Finally, the Hearing Officer stated:

> Even if the interpretation and reasoning of this hearing officer is incorrect, the services required by J.M. still qualify as "school health" services. The [Morton School District] correctly argue[s] that [it] was in no way bound to provide services because testimony demonstrated that services had been provided by [Maycrest School in the Lisbon Community Consolidated Grade School District]. What that testimony did, however, was demonstrate that the services provided to J.M. enabled [J.M.] to benefit from his special education program and that they did not prove to be an undue burden on the [Maycrest School District].

(R. at p. 797). Thus, the Hearing Officer concluded that even if he followed the "undue burden" analysis announced in *Detsel, Neely, Fulginiti, Granite, and Bevin H.*, the services that J.M. requires would not represent an undue burden and the services required by J.M. would therefore still qualify as "school health services." (R. at p. 797).

On January 23, 1997, a Level II Hearing Officer reviewed the Level I decision and determined that the decision was reasonable, well-supported by the record, and not erroneous as a matter of law. (R. at p. 27).

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DISCUSSION

In the instant case, the School District first argues that the administrative officers erred because the services required by J.M. are excluded "medical services." (Doc. # 19 at p. 3-11). The School District acknowledges the Supreme Court's holding in *Tatro*, however, the District argues that *Tatro* is readily distinguishable from the case at bar. The District reads *Tatro* to stand for the proposition that the IDEA requires school districts to provide as a related service only those limited health related functions *traditionally* performed by a *school nurse*. (Doc. # 19 at p. 6). Thus, the District maintains that *Tatro* is distinguishable because Amber Tatro only required catheterization which could be performed by a layperson, whereas J.M. requires the services of a skilled pediatric nurse, *not* a "traditional" school nurse. Specifically, the District states:

> By characterizing the nursing services required to be provided as *school* nursing services, the Supreme Court used language which appears to limit the scope of the nursing services which a school must provide. Nowhere in its opinion does the *Tatro* Court discuss the impact of the statute or regulations on medical services more intense than CIC. The Court never reached or ruled on the issue of whether or not extensive medical services such as those required by J.M. are "related services" within the meaning of any applicable state or federal statute or regulation.

(Doc. # 19 at p. 6) (emphasis in original).

The Court is not persuaded. As the Court has already explained: the IDEA provides that a school district must

provide, at its own expense, "related services." 20 U.S.C. § 1401(a)(17). The IDEA excludes, however, "medical services" unless these services are for diagnosis or evaluation. *Id.* The federal regulations define "related services" as, among other things, "school health services." 34 C.F.R. § 300.16(a). Section 300.16(b)(4) provides that "school health services" are those services provided by a "qualified school nurse *or other qualified person*." (emphasis added). Finally, section 300.16(b)(4) provides that medical services are services provided by a licensed physician.

These federal regulations are entitled to deference if they are considered reasonable interpretations of congressional intent. *See Tatro*, 468 U.S. at 892, 104 S.Ct. at 3377 (*citing Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982)). In *Tatro*, the United States Supreme Court determined that these specific regulations were in fact reasonable interpretations. *Id.* Thus, this Court must defer to the regulations in determining whether J.M. requires "medical services" rather than "school health services." *See e.g. Blum*, 457 U.S. at 141, 102 S.Ct. at 2361.

In the instant action, the Court must determine whether the preponderance of the evidence supports the conclusion that J.M. requires "related services" or "medical services." *See* 20 U.S.C. § 1415(e)(2); 20 U.S.C. § 1401(a)(17). The administrative record contains a letter from J.M.'s pediatrician, Dr. Susan A. Kescskes, dated June 6, 1996. (Record "R." at 794). That letter provided:

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June 6, 1996

Re: [J.M.]

To Whom it May Concern,

This letter is in reference to my patient [J.M.], who is a pupil in your school district. has chronic lung disease and is ventilator dependent. [J.M.] requires [cithera] skilled pediatric nurse or one of his parents with him at all times. He will require a skilled pediatric nurse with him while he attends school.

[J.M.] is ventilator dependent, with a tracheostomy, gastrostomy, and is dependent in activities of daily living. The nurses duties would include: assessment of the respiratory status with appropriate interventions (suctioning, trach care or replacement, oxygen administration, etc), administration of medication (requires hourly eye lubricant to prevent corneal abrasions, administration of nebulized breathing treatments, etc), monitoring of equipment function with troubleshooting as indicated, and assistance with activities of daily living (feeding, toileting, and transfers). The responsibilities outlined above would require a skilled pediatric nurse that is familiar with pediatric ventilator dependent patients, is familiar with the specific equipment used (portable ventilators, metal trachs, oximeter, gastrostomy tubes, suction machine). The parents have completed an extensive training program and are qualified to provide his care needs.

> [J.M.] must be accompanied to and from school with a nurse trained with his care needs and/or his mother. [J.M.] will also require an air-conditioned environment during transport and during school hours due to the nature of his chronic lung disease and reactive airway. Heat and high humidity can exacerbate his respiratory condition. . . .

(R. at p. 464).

This evidence establishes that J.M. requires a "pediatric nurse or one of his parents with him" while he attends school. (R. at p. 464). There is no evidence in the record that indicates that J.M. requires the services of a physician while he attends school. Moreover, the record establishes that J.M.'s parents, both laypersons,[4] were able to provide for J.M.'s daily needs after one week of training. (R. at p. 361—365, 464). In this way, the instant action is quite similar to *Tatro*. There, Amber Tatro's parents, both laypersons, were effectively trained to perform the CIC procedure. *Tatro*, 468 U.S. at 885, 104 S.Ct. at 3373. Here, J.M.'s parents, both laypersons, have been trained to, for example, maintain J.M.'s tracheostomy. (*See* R. at p. 365). Accordingly, the preponderance of the evidence demonstrates that J.M. requires "school health services," not "medical services" since J.M. does not require the services of a physician while he attends school. *See Tatro*, 468 U.S. at 892, 104 S.Ct. at 3377; *Garret*, 106 F.3d at 825; *Skelly*, 968 F.Supp. at 395;, 20 U.S.C. § 1401(a)(17); 34 C.F.R. § 300.16(b)(11); 34 C.F.R. § 300.16(b)(4).

The Court is fully aware that the United States Supreme Court is currently considering a petition for a writ of certiorari

4. J.M.'s father is a computer analyst for Caterpillar Inc., and J.M.'s mother is a school teacher. (R. at p. 355-385).

in *Cedar Community School District v. Garret F.*, 65 U.S.L.W. 3768 (May 8, 1997). However, this Court is not prepared to deny J.M. a "free appropriate education" on the basis that the Supreme Court *might* reverse the Eighth Circuit's holding in *Garret*.

Next, the Morton School District cites *Neely, Detsel, Fulginiti, Granite*, and *Bevin H.*, to support its argument that J.M.'s needs will unduly burden the school district. However, each of these cases relied on dicta from the Tatro decision. Indeed, the Eighth Circuit in *Garret* observed:

> The court is aware of several decisions that have not interpreted *Tatro* as establishing a bright-line, physician/non-physician test for medical services. *See Detsel v. Board of Educ. of Auburn*, 637 F.Supp. 1022 (N.D.N.Y.1986), *aff'd* 820 F.2d 587 (2d Cir.1987)[ ]; *Granite School Dist. v. Shannon M.*, 787 F.Supp. 1020 (D.Utah 1992); *Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir.1995). Going beyond the physician/non-physician distinction the Supreme Court found in the statute and the regulations, these courts rely on dicta in *Tatro* in order to factor into the medical services exclusion considerations of the nature and extent of the services performed. The Court declines to seize dicta in *Tatro* to go beyond the physician/non-physician test which the Supreme Court sets forth therein.

Garret F., 106 F.3d at 825.

Moreover, even if this Court were to follow *Detsel* and its progeny, such an approach would not change the result here

since the record establishes that the services that J.M. requires do not necessarily represent an undue burden. That is, the record indicates that (1) J.M. attended the Maycrest School in the Lisbon Community Consolidated Grade School District from 1991 to 1996, (R. at p. 389-399), (2) the Lisbon Community Grade School District contracted with a nurse, Faith Read, to provide health services for J.M., (R. at p. 389, 773), (3) J.M. made social and educational gains while attending the Maycrest School, (R. at p. 403, 406), and that (4) the Lisbon School District provided the services of Faith Read at its own expense. (R. at p. 391). Thus, the record shows that a school district like Morton is not necessarily burdened and/or unduly burdened by a student like J.M. Indeed, the Maycrest School provided school health services for J.M. for nearly five years without incident. (Doc. # 25 at ¶ 33).

Furthermore, in reviewing the administrative record, this Court is required to give "due weight" to the results of the administrative proceedings and may not substitute its own notion of sound educational policy for that of the Illinois State Board of Education. *See Heather S.*, 125 F.3d at 1052; *see also Monticello School District v. George L.*, 102 F.3d 895 (7th Cir.1996); *Board of Educ. of Murphysboro v. Illinois State Board of Education*, 41 F.3d 1162, 1166-67 (7th Cir.1994). Here, both Hearing Officers concluded that the services required by J.M. did not represent an undue burden given the Maycrest School District's ability to provide the services for five years prior. (R. at p. 18, 19, 797). In this regard, the Level II Hearing Officer stated:

> Although the [Morton School District] would like to minimize the importance of the [Maycrest School District's] actions, the fact remains that by

> providing [J.M.'s] health care services for five years, the [Maycrest School District] demonstrated that it found that supplying the requested services posed neither an undue financial burden nor a challenge that was beyond the range of the educators' competence.

(R. at p. 18 n. 4). Thus, since the Court may not substitute its own judgment for that of the Illinois State Board, even if the Court were to follow *Detsel* and its progeny, the result here would be the same.

Nevertheless, the Morton School District insists that "the provision of medical care to J.M. would impose an undue burden on Morton School District." (Doc. # 19 at p. 17). Specifically, the District states:

> School districts have no expertise in the provision of medical services such as those required by J.M. In the absence of such expertise, they have no means to effectively evaluate the nature or the quality of the services provided to students such as J.M. *Consequently, the District would be susceptible to claims for malfeasance and negligence* in the event that a provider of medical care under the employment of the District erroneously or inadequately performed its obligation.

(Doc. # 19 at p. 17) (emphasis added).

The Court agrees that servicing the needs of disabled students like J.M. is obviously more difficult than attending to the needs of children who do not suffer from such disabilities.

However, this Court cannot rewrite the IDEA. That is, the Act seeks to assure that *all* children *with disabilities* have available to them a free appropriate public education. 20 U.S.C. § 1400(c). In addition, the statute provides several types of supportive services for disabled children which are much more extensive than those *ordinarily* provided to public school students, e.g., speech pathology, audiology, psychological services, and therapeutic recreation services. 20 U.S.C. § 1401(a)(17). Thus, by its very nature, the statute imposes the very burden on school districts that Morton now seeks to avoid. Accordingly, if Morton objects to the obligations imposed by the IDEA, then it should take that grievance up with the legislature *not* the judiciary. Furthermore, the possibility that the Morton School District might be sued based on a negligence theory does not persuade the Court that it should relieve the Morton School District of its legal obligation to provide the services that J.M. requires.

Next, the Morton School District argues that the administrative "officers employed an improper standard in determining whether or not J.M.'s medical services are 'necessary to aid a handicapped child to benefit from special education.' " (Doc. # 19 at p. 15-17). Here, the District maintains that there must be some proximate relationship between the services that J.M. requires and the educational programs of the Morton School District. (Doc. # 19 at p. 16) (*citing Clovis Unified School District v. Office of Administrative Hearings*, 903 F.2d 635 (9th Cir.1990)). Specifically, the District states:

> [A] school district is required to provide only those services which are related to the educational process as determined by applicable statutes and regulations.

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> The mere fact that the provision in the school setting of the nursing services which enable J.M. to breathe would also permit him to attend school does not mean that the Morton School District must provide such medically related services at its expense. The medical services which J.M. requires are the same whether he is in school or out of school. Those services have no special or particular relationship to the educational process. They are necessary for J.M. to attend school only in the same sense that other basic needs, such as food, clothing and shelter are similarly necessary. Both the Level I and Level II Hearing Officers essentially ignored the medical services exclusion and employed an inappropriate standard to determine whether or not the requested services are "necessary to aid a handicapped child to benefit from special education."

(Doc. # 19 at p. 16-17).

The School District's argument fails for two reasons. First, it assumes that J.M. requires "medical service" which the Court has already rejected. Second, the argument cannot be reconciled with the Supreme Court's holding in Tatro. There, the Supreme Court stated:

> The issue in this case is whether CIC is a "related service" that [the School District] is obliged to provide Amber. We must answer two questions: first, whether CIC is a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education" . . .

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> The Court of Appeals was clearly correct in holding that CIC is a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education." It is clear on this record that, without having CIC services available during the school day, Amber cannot attend school and thereby "benefit from special education." CIC services, therefore fall squarely within the definition of a "supportive service"

Tatro, 468 U.S. at 890, 104 S.Ct. at 3376.

Amber Tatro required CIC whether she was at home or at school just as J.M. requires, for example, trach care while at home or at school. The relationship between the services required by Amber and J.M. is that neither child can benefit from public education without the services. In this light, the Court finds no merit in the Morton School District's argument.

Finally, throughout the Morton School District's memorandum in support of its motion for summary judgment, the District argues under various statutes and regulations that the IDEA only requires a school district to provide the services of a *traditional* school nurse. In short, the Court disagrees for the reasons already stated. The Court notes, however, that the School District defines the duties of a school nurse as: "record keeping" and "minor emergency services for the entire student population and staff." (Doc. # 19 at p. 12). Thus, if the Court were to accept the District's argument, very few, if any, disabled children could benefit from the IDEA if they were only permitted to attend school where their disabilities could be adequately attended to by a traditional school nurse as defined by the Morton School District.

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CONCLUSION

The Court finds that the preponderance of the evidence supports the conclusion that J.M. requires *and* is entitled to "related services" under the IDEA. Thus, the Illinois State Board decision correctly directed the Morton School District to identify and contract with a qualified individual to provide services to J.M. IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment [Doc. # 22] is **GRANTED**. IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment [Doc. # 17] is **DENIED**. IT IS FURTHER ORDERED that Defendants' Motion for Preliminary Injunction [Doc. # 14] is **DENIED** as **MOOT**. The Clerk of the Court is directed to enter **JUDGMENT** in favor of Defendant and against Plaintiff. The Clerk is further directed to **TERMINATE** this case.

APPENDIX C — LEVEL II REVIEW OF THE ILLINOIS STATE BOARD OF EDUCATION DATED JANUARY 23, 1997

ILLINOIS STATE BOARD OF EDUCATION

Level II Review

Case No. 96-036

IN THE MATTER OF

THE SPECIAL EDUCATION OF

Jon McKanna

* * *

I. INTRODUCTION

The school district filed an appeal of the Level I decision and requested oral argument. The Level II reviewing officer offered November 15, 1996 as a hearing date. The district was unable to proceed on that date and made a written request for an extension of time. The parties agreed on December 2, 1996 as an acceptable date. The hearing was held at the office of the district superintendent in Morton, Illinois. The hearing was transcribed. Both parties were given the opportunity to examine and cross-examine all witnesses. Both parties offered closing statements on the record and expressed a desire to write briefs as well. The briefs were received on December 12, whereupon the reviewing officer declared the record closed.

II. BASIS FOR THE APPEAL

The district's appeal request sets forth rulings of the Level I hearing officer that it argues are erroneous, as follows:

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1. Jon Mikel McKanna, the student in question, has Noonan's Syndrome. The manifestations of that condition in this case require full-time care by a skilled pediatric nurse whether or not the student is attending school. The Level I Decision erroneously concludes that the services required by the student are related services which must be provided at the expense of the District rather than medical services which need not be provided at the expense of the District.

2. The Level I Decision erroneously concludes that the services requested on behalf of the student at the expense of the District are school health services.

3. The Level I Hearing Officer erroneously admitted and considered evidence that a prior school district in which the student resided had provided the requested services at its expense. The decision of another district to voluntarily provide medical services at its expense does not bind the Morton District to also provide those services at its expense.

4. The Level I Decision erroneously concludes that the services which the student requires qualify as related services rather than medical services merely because these services are provided by a skilled pediatric nurse rather than by a physician.

The District hereby requests that erroneous rulings on both substantive and evidentiary matters be reversed and that the Level II Hearing Officer enter an order determining that the services required by the student are medical services which need not be provided at the expense of the District rather than related services which must be provided at the expense of the District.

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III. POSITIONS OF THE PARTIES.

A. *The District*

The district's position, briefly stated, is that the district has no obligation under the law to pay for the extensive nursing care required by the student's medical condition.

The district notes that the provision of special education to students with disabilities is governed by federal law: the Individuals with Disabilities Education Act (IDEA). IDEA requires public schools to provide both educational services and "related services" necessary to assist a disabled child to benefit from public education. IDEA defines "related services" as including "medical services," but only for the purposes of diagnosis and evaluation. All other "medical services," the district maintains, are excluded from the type of services that the district is required to provide.

The district asserts that, if nursing services requested on Jon's behalf constitute excluded medical services within the meaning of IDEA, the Morton School District is not required to provide them. The district maintains that, since IDEA provides no further detail regarding the definition of medical services, this case must be resolved, at least in part, by resorting to interpretative regulations and case law.

The leading case on the issue of distinguishing "medical services" from "related services" is *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984). In *Tatro*, the Supreme Court concluded that the clean intermittent catheterization (CIC) ~~that the~~ child required was a related service and ordered the school district to provide that service at its expense. In the

district's view, the services requested by Jon are clearly distinguishable from those required by Amber Tatro because of the continuous, intense attention that Jon requires and the serious consequences of any failure to attend to his needs. The district emphasizes that, contrary to the parents' assertion, Jon's care cannot be considered intermittent because a nurse must be present at school at all times to address his needs.

The district argues, in effect, that both the parents and the Level I hearing officer have read into Tatro a "bright line distinction" between "medical services" that must be performed by a physician or hospital, and all other health care services, including services as complex as those that must be performed by a skilled pediatric nurse. The district avers that the Supreme Court in Tatro never reached or ruled on the issue of whether or not extensive medical services such as those required by Jon are "related services" within the meaning of any applicable state or federal law or regulation.

The district contends that a fair reading of *Tatro* will disclose that in reaching its decision the Supreme Court addressed only the issue of whether or not an intermittent type of service capable of being readily and easily performed by a school nurse qualified as a related service. As an illustration, the district points to the so-called "three-part test" by which the Court limits the district's responsibility to provide health care services. The district argues that this test emphasizes the role of the school nurse. In the district's view, the Level I decision unfairly paraphrases the "three-part test" in a way that improperly ignores references to *school* nursing services.

In support of its argument, the district offers cases from two separate Federal Circuit Courts of Appeal and three separate

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Federal District Courts, *Neely v. Rutherford County School District* 68 F.3d 965 (6th Cir. 1995), *Detsel v. Board of Education of Auburn City School District*, 20 F.2d 587 (2nd Cir. 1987), *Fulginiti v. Roxbury Township Public Schools*, 921 F.Supp. 1320 (D. N.J. 1996), *Granite School District v. Shannon M.*, 787 F.Supp. 1020 (D. UT 1992), and *Bevin H v. Wright*, 666 F.Supp 71 (W. D. PA 1987), referred to hereinafter as *Neel Detsel*, *Fulginiti*, *Granite*, and *Bevin H.* respectively. The district, in reviewing facts and findings of these cases, remarks that all of them have to do with a child who uses a tracheostomy tube. The district contends that, in view of the remarkable factual similarity between these cases and Jon's, the Level I hearing officer's conclusion that Jon's needs "are not so complex as those of the other children" is inappropriate and erroneous. The district observes that the case cited in support of the parents' position are of minimal stature and precedential value.

The district further argues that applicable state regulations specifically exclude services of the type requested for Jon. In particular, the district points to 23 I.A.C. 226.250 (b) (5) (c), which excludes the services of registered and licensed practical nurses from the sort of "therapeutic services" that must be provided by the district, and 23 I.A.C. 226.562 (a) (3), which excludes the services of registered and licensed practical nurses from the sort of "related services" that the IEP must include.

The district notes that the duties of a school nurse typically include record keeping, educational and minor emergency services for the student population and the staff. The district notes that even the Level I decision concedes that Jon's needs are beyond the function of a school nurse. Therefore, the district argues, the nursing services that the parents request are excluded

as a related service by both 226.250 (b) (5) (c) and 226.562 (a) (3) .

The district further contends that the medical services that Jon requires are not "school health services" within the meaning of any applicable law. School health services are defined at 23 I.A.C. 226.5 as "services provided by a qualified school nurse or other qualified person." Both the parents and the Level I decision argue or imply that the term "other qualified person" must be read expansively to include any person other than a physician who is providing medically related services in a school setting. This interpretation, the district argues, would render meaningless the exclusions in 226.250 (b) (5) (c) and 226.562 (a) (3) of registered and licensed practical nurses.

The district further argues that the Level I hearing officer erroneously based his decision, at least in part, on a conclusion that Jon could not remain in school without the requested services and that the school must therefore provide those services in order to permit his attendance. The district avers that the acknowledged fact that Jon cannot attend school without medical services does not compel the conclusion that the school must provide those services. Citing *Clovis Unified School District v. Office of Administrative Hearings*, 903 F2d 635 (9th Cir. 1990), the district concludes that a school is not required to provide every service, regardless of its nature, that might enable a student to attend school or benefit from special education. The district contends that there is no proximate relationship between the medical services requested by the parents and the educational programs offered by the district.

The district maintains that the question of whether the child benefits from attending school is immaterial to whether the

school must provide medical care as a related service. The district's obligation to provide related services to its disable students is not measured by the extent to which those students benefit from the program.

Finally the district argues that requiring the school to provide medical care to Jon would impose an undue burden on the district, both by imposing a financial burden and by requiring the district to provide services beyond the range of their competence, leaving the district exposed to claims of malfeasance and negligence in case the provider of medical care under the employment of the district inadequately performed its obligations.

B. The Parents

The parents' position, briefly stated, is that the Level I hearing officer made proper findings of fact, made no incorrect findings or statements, and understood the facts very well. They also assert that the Level I hearing officer made correct conclusions of law as adduced from the facts presented.

The parents argue that both federal and state regulation provide for "school health services," meaning services provided by a qualified school nurse or other qualified person. They assert that the services that they request would not conflict with current state regulation. By way of example, they discuss language at 23 I.A.C. 226.250(5), which expressly excludes the services of registered and licensed practical nurses from the "therapy services" that the school district must provide. The parents note that they do not ask, and have never asked, for "therapy services" for their child.

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The parents argue that the policy of the prior school district is relevant to this case. Since the child's prior school district provided health-care services to enable him to attend school, the parents ask why a move within the state of Illinois should change the child's right to a free and appropriate public education.

The parents argue that the Level I hearing officer carefully examined Jon's needs, and examined them in light of the services he needed, the burden on the district, and the benefit that this student would have by being in school with the services of a trained, qualified person. In the parents' view, the Level I hearing officer properly concluded that the district must contract with a qualified person in order to meet its responsibilities under IDEA.

IV. FINDINGS AND DECISION

A. Statement of the Issue

In the reviewing officer's judgment, the simplest way to address the issue of whether the services that the parents request are "related services" is to paraphrase the questions that the Supreme Court posed in *Tatro*: first, whether the services that Jon requires are "supportive services" that may be required to assist a handicapped child to benefit from his special education; second, whether the services that Jon requires are excluded from the definition of "related services" as "medical services" serving purposes other than diagnosis or evaluation. (See 468 U.S. at 890.)

A clear statement of the issues is important in this case. As noted in *Macomb County Intermediate School District v.*

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Joshua S., 715 F.Supp. 824 (E.D. Mich 1989), failure to clarify the issue had led some federal courts that have considered the problem of "medical services" versus "school health services" to apply an improper analysis to the holding of *Tatro*:

> The difficulty this Court has with both *Detsel* and *Bevin* are (sic) their failure to adhere to certain principles developed in *Tatro*. Due to this failure, the decisions are not entirely clear as to whether the disputed services were rejected as not representing "supportive services" under the EAHCA [Education for All Handicapped Children Act], or whether they fell within the "medical services" exclusion. 715 F.Supp. at 826.

The Level I decision, as the reviewing officer reads it, does follow the analysis of the issues that the Court used *Tatro*. Although the Level I hearing officer does not expressly find that the health-care services that Jon needs are "supportive services," his discussion assumes that they are.[1] Having assume that the services that Jon needs are "supportive services," the Level I hearing officer concludes that the services that Jon requires are not "medical services" but are rather "school health services," which the district is required to provide.

The Level II decision will also follow this approach.

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1. The district makes the same observation in its brief: "The Level I hearing officer appeared to base his decision, at least in part, upon a conclusion that Jon could not remain in school without the requested services and, therefore, that the School must provide those services in order to permit his attendance" (brief , p. 17).

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B. Jon's Health Care as a Supportive Service

The district states, correctly, that a school district is not required to provide every service, regardless of its nature, that might enable a child to attend school. The reviewing offices disagrees, however, with the district's conclusion that the proximate relationship that must exist between the services requested and the educational programs offered by the school does not exist here. Indeed, in this case, the reviewing officer find the relationship between the child's health-care needs and the school's educational function to be the most basic and immediate one that could exist: the requested services provide Jon's access to a free and appropriate public education.

In support of its position that a school district is not required to pay for any and all health-care services that are "supportive" of a handicapped child's education, the district cites *Clovis Unified School District v. Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990). The reviewing officer finds that the instant case is clearly distinguishable from *Clovis*. *Clovis* itself dealt with intense therapeutic care (six hours of psychotherapy per day in an acute care psychiatric hospital), which is far from the sort of attention that Jon requires in his classroom setting, by reason of both the nature and intensity of the care required. The examples used by the *Clovis* court of services that a school district should not be required to provide are ear surgery and kidney dialysis, both of which can be best characterized as remedial or therapeutic in nature, in my view. (Interestingly, both would also be administered most appropriately at some time other than during the school day, thus failing to meet the second *Tatro* test). By contrast, Jon's parents are not asking for a treatment, therapy, or cure of his

condition at public expense.[2] They are asking solely for services sufficient to allow him to attend school. In the reviewing officer's judgment, the parents have accurately characterized this as a "basic access case."

The role of supportive services in providing meaningful access to education for special education students is discussed in *Tatro*:

> As we have stated before, "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." A service that enables a child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class; and the Act specifically authorizes grants for schools to alter buildings and equipment to make them accessible to the handicapped. *Services like CIC that permit a*

2. The reviewing officer agrees with the parents' contention that they have never sought "therapeutic services" for Jon. Absent a statutory definition of "therapeutic," we are left with its ordinary meaning. Webster's Third International Dictionary defines therapeutic as "of or relating to the treatment of disease or disorders by remedial agents or methods: curative, medicinal." There is no evidence that the parents are attempting to achieve a remedy or cure of Jon's handicapping condition through the agency of his caretaker during school hours. Thus the exclusion of "registered and licensed practical nurses" and "other medical personnel involved in the provision of on-going medical care" from the definition of "therapeutic services" found at 225 I.A.C. 250(b) (5) (c) is immaterial to Jon's case.

> *child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter or exit the school.* 468 U.S. at 891. (Citations omitted, emphasis supplied.)

The reviewing officer finds that the services required by Jon, though more extensive than those required in *Tatro*, are substantially like the clean intermittent catheterization services needed by the child in that case in several key respects: they are not therapeutic in nature, they can be administered by a trained lay person, and, without these services, the disabled child is denied meaningful access to special education. Accordingly, under *Tatro*, the reviewing officer finds that the services sought by the parents in the instant case are "supportive services" as defined by both federal and Illinois law.

C. "Medical Services" versus "School Health Services"

In its brief, the district asserts that the Level I hearing officer's characterization of the requested health-care services as "school health services" is "quite clearly contrary to applicable regulations and inconsistent with the great weight of the interpretive case law" (brief, p.16). The reviewing officer finds that this statement is somewhat unfair, since the Level I hearing officer was clearly careful to make his conclusions and Order consistent with several different analytic approaches that he applied to the facts, including the reasoning employed by the authorities cited by the district.

It is true that the Level I hearing officer adopted a reading of the *Tatro* decision that the district finds unacceptably expansive: under Findings/Conclusions 4, he stated that his "reading of [that] decision supports the interpretation that

'medical' services require the expertise and knowledge of a physician, while 'school health' services can be performed by a school nurse or other qualified person." The reviewing officer notes, however, that this statement is not the sole basis of the Level I decision; in fact, is only the beginning of a comprehensive discussion of the distinction between medical services and school health services. The Level I hearing officer went on to quote language in *Tatro* that supports his interpretation. He used an Iowa case, found at 22 IDELR 278, and an OSEP letter, found at 20 IDELR 174, as guides to the interpretation of *Tatro*. He applied the *Tatro* court's three-part test for determining a school's responsibility to provide related services, to the facts of this case and concluded that the services required by *this* child in *this* case are "school health services rather that "medical services."

The Level I hearing officer then considered the cases cited by the district, cases which all reject a reading of *Tatro* that sees a "bright line distinction" between the services of a physician, which the school is not required to provide, and all other health-care expenses, no matter how complex or extensive, which the school must provide. In Finding/ Conclusion 5, he made an effort to reconcile his findings with the reasoning of the line of cases cited by the district.[3] The

3. In its brief, the district expressed dissatisfaction with the factual distinctions that the Level I hearing officer drew between Jon's case and those cited by the district. Although he did not discuss each case individually, the Level I hearing officer did conclude that "the facts in each of the above cases differ from the facts of this case," noting that Jon's needs, "while clearly more extensive than those of the child in *Tatro*, are not so complex as those of the other children [in the cases cited by the district]." Although the reviewing officer acknowledges that the children in *Neel* and *Fulgihiti* do not seem to be notably more

(Cont'd)

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Level I hearing officer applied the analytical approach used by the courts in *Detsel*, *Neely*, and *Fulginiti* (that is, whether the services requested would be an undue burden on the district) and concluded that, *under the facts of this case,* including the consideration that another district had already provided the services to Jon for five years, Jon's services would still qualify as "school health services."[4]

Moreover, when the Level I hearing officer discussed the identity and qualifications of the child's caretaker, he went out of his way to de-emphasize the status of the provider. He stated instead that this person needed to be a "trained individual" and

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(Cont'd)
handicapped than Jon, the Level I hearing officer's conclusion about the comparative complexity of the other children's needs seems to be well-justified with respect to *Bevin H.*, where the child suffered from, among other things, spastic quadriplegia and seizure disorder; to *Detsel*, where the caretaker had to perform pulmonary therapy and to administer medication to the jejunum by tube; and to *Granite*, where the child's doctor had entered a "do not resuscitate" order in case of cardiac arrest. In the reviewing officer judgment, the Level I hearing officer's attempt to distinguish the federal court cases from Jon's case, while somewhat sweeping, is accurate with respect to three of the district's key cases. Thus the reviewing officer does not agree with the district's statement that the Level I hearing officer's conclusions on this point are "completely unsupported by a comparison of the facts" or that he "inappropriately used this erroneous finding to circumvent the case law" supporting the district's position (brief, p. 10).

4. Although the district would like to minimize the importance of the prior district's actions, the fact remains that by providing Jon's health care services for five years, the prior district demonstrated that it found that supplying the requested services posed neither an undue financial burden nor a challenge that was beyond the range of the educators' competence.

a "nurse or other qualified person." In the Order, he states that the district must contract with "a qualified individual." Thus it is apparent that the Level I hearing officer focused on the nature of the services to be provided, rather on the status or title of the provider, which is an analytical approach employed in another of the district's key cases, *Clovis*.

Regarding the regulations that exclude the services of registered nurses and licensed practical nurses from the services which the district must provide, the reviewing officer notes that the district's arguments seem to ignore the fact that the Level I Order does not require that the district hire a *nurse* to provide services to Jon. The Level I hearing officer carefully crafted an order that has two functions: first, it addresses Jon's needs, which can be met by a trained, qualified person, whose status may lie anywhere along a spectrum from trained layperson to skilled pediatric nurse; second, it avoids the roadblocks that the district searched for, in case law and in interpretative regulation, to requiring schools to provide skilled nursing care in order to enable special education students to remain in school.[5]

In the reviewing officer judgment, the Level I hearing officer's conclusions on the issue of "medical services" versus "school health services" were the summary of a carefully reasoned and articulate discussion of the authorities applicable to this case, were firmly rooted in the facts of this case, and were not erroneous.

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5. The reviewing officer notes that, as discussed in Section B of this decision, the parents are not asking the district to supply "therapeutic services" for their child.

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D. "These New Risks" under the Tatro Decision

To the extent that the Level I decision may be said to be "inconsistent with the great weight of case law," the reviewing officer finds that the Level I decision is an appropriate application of the principles of the Tatro decision to the facts of this case.[6] The reviewing officer further finds that the "great weight of case law" as represented by *Detsel*, *Neely*, *Granite*, *Bevin H.*, and *Fulginiti* is a distortion of the holding of *Tatro*.

Interestingly, the district observes that the Supreme Court "never reached or ruled on the issue of whether or not extensive medical services such as those required by Jon are 'related services' within the meaning of any applicable state or federal statute or regulation" (brief, p. 6-7). The district's view of *Tatro*'s limits is certainly not shared by the federal court opinions on which the district relies. These courts confidently conjure up burdens tests, interest-balancing tests, considerations of the nature and purpose of services, and cost considerations, all in the name of and allegedly derived from *Tatro*.

The reviewing officer's assessment of *Detsel* and its offspring is well expressed in an Iowa state-level administrative law decision, *In Re Cedar Rapids Community School District*, found at 22 IDELR 278. The district points out that this decision has "minimal stature and precedential value" in comparison with the numerous federal court decisions that it cites; yet, in the reviewing officer's judgment, *In Re Cedar Rapids* is consistent with *Tatro* and with IDEA, whereas the federal court cases cited by the district are not.

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6. The reviewing officer notes that none of the federal court decisions cited by the district in support of its position are from the Seventh Circuit, which is where the child resides; thus the *Tatro* decision governs both the Level I and Level II decisions in this case.

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In *Cedar Rapids*, the administrative law judge focused on what *Tatro* actually says and on what it does not say:

> In dicta, which later became important in other subsequent litigation on the issue, the Court noted that a distinction between nursing services and treatment by a physician as a related service was reasonable. Part of the reasonableness was concluded to be a consideration of differentiation of costs between nursing and physician services and the fact that school nurses '"have long been a part of the educational system."
>
> *The Court did not say that cost was a factor to be considered by courts. It merely speculated that Congress and the Department of Education may have used expense, as well as limitations of educators' expertise in medical matters, for making a distinction between nursing services and physician treatment as a related service.* The Court expressly rejected the school's argument that services provided in accordance with a physician's prescription and general supervision fell within the medical treatment exclusion. It noted that nurses in the school were authorized to dispense medications and administer emergency injections to nondisabled students in accordance with a physician's prescription.
>
> Thus in *Tatro, the Court affirmed a Congressional and administrative distinction* between nursing services and medical treatment as a related service under the Education of the Handicapped Act, now

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> Individuals with Disabilities Education Act (IDEA). 22 IDELR at 285. (Citations omitted, emphasis supplied.)

The ALJ also highlights the central holding of *Tatro* (as opposed to the dicta he examined previously) and discusses how federal courts have distorted it:

> Since the issuance of the *Tatro* ruling ten years ago, this ALJ has had occasion to read it at least a dozen times. Every time it has been read, it was thought to have affirmed a "bright line" distinction between "school health services" ("Services provided by a qualified school nurse or other qualified person") and "medical services" provided by a physician that are not related to evaluation and assessment. If a nurse's services were needed, the school had to provide them as a related service. If the service "must be provided" as treatment by a licensed physician, the services were not a related service. The Court in *Tatro* even discussed with approval the provision of health care services under a physician's prescription and "ultimate supervision." *The Court did not ever say that the cost and extent of medical expertise were relevant, only that Congress and the Department of Education may have considered them.*
>
> Nothing in the subsequent rulings in *Detsel*, *Bevin H.*, *Shannon M.*, *Ellison*, or *Neely* has changed this ALJ's understanding of *Tatro*. Like the Court in *Joshua S.*, he is not able to find the distinctions made in these rulings. It appears more to this ALJ that

> those courts were substituting their own judgment for that of Congress and the Department of Education. They stretched some statements of the Supreme court completely, and took others out of context to fashion what they thought "should be." As much as this ALJ may disagree with the public policy of spending education funds on health services, he does not feel he has the authority to change the law. 22 IDELR at 287.
>
> (Citations omitted, emphasis supplied.)

To those readers of *Tatro* who argue that the holding is strictly confined to the facts of the case and cannot be read expansively, the reviewing officer would point out footnote 12 of that decision:

> Petitioner attempts to distinguish the administration of prescription drugs from the administration of CIC on the ground that Texas law expressly limits the liability of school personnel performing the former, but not the latter. This distinction, however, bears no relation to whether CIC is a "related service." *The introduction of handicapped children into a school creates numerous new possibilities for injury and liability. Many of these risks are more serious than that posed by CIC*, which the courts below found is a safe procedure even when performed by a 9-year-old girl. *Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks.* Whether petitioner decides to purchase more liability insurance or to persuade the State to extend the

> limitation on liability, the risks posed by CIC should not prove to be a large burden. 468 U.S. at 893. (Citations omitted, emphasis supplied.)

In the reviewing officer's reading of this footnote, it seems undeniable that the Supreme Court contemplated that school districts would be called upon to deal with cases more complex that that of Amber Tatro, and that the Court further determined that Congress had already made generous provision to compensate states for managing "these new risks," with their attendant burdens and potential liabilities. When the Court observed that Congress assumed that states would be "up to the job" of managing these new risks, the reviewing officer believes that the Court was referring to cases like Jon's — children with needs somewhat more complex than Amber Tatro's but not so complex as to require the services of a physician.

In the reviewing officer's judgment, the Level I decision contains an appropriate and well-reasoned interpretation of *Tatro*. In Finding/Conclusion 4, the Level I hearing officer carefully reviewed *Tatro*, and other authorities, in light of the facts of this case. In particular, he found that Jon's case met *Tatro*'s three-part test. The reviewing officer finds that the Level I hearing officer's conclusion and Order are well-supported by the facts and consistent with both *Tatro* and IDEA.

E. Evidence of the Prior School District's Actions

The district argues that the Level I hearing officer committed error in both admitting and considering evidence of the actions of Jon's prior school district.

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As the parties are aware, the rules of evidence are not strictly applied in either the Level I or the Level II hearings. In the reviewing officer's judgment, the only evidence that should be excluded is that which is wholly irrelevant. The fact that another school district supplied the services that the Morton school district is seeking to avoid is clearly relevant. The reviewing officer finds that the admission of this evidence was not error.

The fact that the Level I hearing officer admitted and considered this evidence does not mean that he concluded that the Morton school district is obliged to supply the services that the child's former school district voluntarily supplied. Indeed the Level I hearing officer expressly found that the prior district's actions were *not* binding on Morton. The district's inference that the Level I hearing officer did reach such a conclusion is a mischaracterization of the Level I decision.

The Level I hearing officer concluded only, (1) that the services provided by the prior school district enabled Jon to benefit from his special education and (2) that they did not prove to be an undue burden on the prior district. The reviewing officer finds that these conclusions were reasonable, well-supported by the record, and not erroneous as a matter of law.

V. ORDER

The Level I Order is affirmed.

s/ Angela R. Murphy
Angela R. Murphy
Level II Review Officer

Chicago, IL

January 23, 1997

Supreme Court, U.S.
FILED
JAN 11 1999
OFFICE OF THE CLERK

No. 98-764

In The

Supreme Court of the United States

October Term, 1998

MORTON COMMUNITY UNIT SCHOOL DISTRICT NO. 709,

Petitioner,

v.

J.M., a minor; M.M. and S.M., Individually and as parents and next friends of J.M. and the ILLINOIS STATE BOARD OF EDUCATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTION PRESENTED

The question presented in this case is:

Whether tracheotomy and other services needed by a special education student, in order to attend school, which can be provided by a non-physician and do not constitute an undue burden upon the school district, financially or otherwise, constitute a "related service" and not a "medical service" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401(a)(17) (West 1996)[1]

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[1] When this litigation began in July, 1996, the 1997 IDEA Amendments had not yet been enacted. The citations to the IDEA throughout this brief are to the pre-1997 amended statute.

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II. There is no reason to hold this petition pending a decision in *Cedar Rapids Community School District v. Garret F.*, because even if this Court rejects a "bright-line" test for determining whether a health service is an excluded "medical service" under the IDEA, the Respondent would prevail because the Court below held that there would be no undue burden imposed by providing the services 11

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STATUTES CITED

20 U.S.C. § 1400 *et seq.* 2

20 U.S.C. § 1400(c) 2

20 U.S.C. § 1401(a)(17) 2

RULES CITED

34 C.F.R. § 300.16(a) 2, 3

34 C.F.R. § 300.16(b)(11) 3

34 C.F.R. § 300.16(b)(4) 3

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEDURAL BACKGROUND

The Petitioner Morton Community Unit School District No. 709 ("the School District" or "Morton") seeks review in this Court of the Seventh Circuit's decision affirming the District Court's decision, which held that the Respondent J.M. is entitled to the health services he needed to attend school, which included care of his tracheotomy. The court held that these were "related services" under the IDEA and thus that Morton must identify and contract with a qualified individual to provide services to J.M. The Seventh Circuit concluded that the health services needed by J.M. did not impose an undue burden on Morton, in part because Morton had admitted the services posed no financial burden on the School District. The court below neither accepted nor rejected the bright-line test for determining whether a health service is an excluded "medical service" under the IDEA that some courts have held is mandated by this Court's decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984). Nevertheless, the court below held that the services that J.M. needed to attend school, are "related services" under the IDEA. (Pet. App. at 11a).[2] The court reasoned that despite the protests by the School District that it has insufficient school nursing staff, the services did not constitute an undue burden on the district.

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[2] Cites to "Pet. App." refer to the appendix filed with the Petition to this Court. Cites to "App." refer to the Appendix filed in the Seventh Circuit Court of Appeals.

This case is governed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and the applicable regulations at 34 C.F.R. § 300.16(b)(11). Under the IDEA eligible students are entitled to:

> a free appropriate public education that emphasizes special education and *related services* designed to meet their unique needs and prepare them for employment and independent living. (emphasis supplied)

20 U.S.C. § 1400(c) (West, 1996)

The term "related services" means:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, *and medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. (emphasis supplied)

20 U.S.C. § 1401(a)(17) (West, 1996)

"Related services" are described in the Code of Federal Regulations interpreting the IDEA at 34 C.F.R. § 300.16(a):

> (a) As used in this part, the term "related services means transportation and such developmental, corrective and such developmental,

> corrective and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. *The term also includes school health services,* social work services in schools, and parent counseling and training. (emphasis supplied)

34 C.F.R. § 300.16(a)

School health services and medical services are further defined by regulation:

> School health services means services provided by a *qualified school nurse or other qualified person.* (emphasis supplied)

34 C.F.R. § 300.16(b)(11)

> "Medical Services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

34 C.F.R. § 300.16(b)(4)

Prior to the School District's complaint filed in U.S. District Court against J.M. and his parents, two successive administrative hearing officers appointed by the Illinois State Board of Education entered decisions and orders in favor of J.M. The orders of September 23, 1996 (the Level I Hearing) and January 23, 1997 (the Level II Review), determined that J.M.'s requested services were

"related services" under the IDEA. Morton was ordered to identify and contract with a qualified person to provide these services to J.M. Since the inception of the first due process hearing in July 1996, Morton has refused to provide the requested services, and it continues to withhold from J.M. the related services held on July 27, 1998 to be legitimate under the IDEA by the Seventh Circuit Court of Appeals.

This Court currently has under advisement a case that presents the question whether a bright-line, physician/non-physician, test for determining whether a health service is an excluded medical service is required by this Court's earlier decision in *Tatro*. *See, Cedar Rapids Community School District v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 1793 (U.S. May 18, 1998). In *Cedar Rapids*, the student's health services were found to be "related services" under the IDEA by a state level hearing officer through an analysis of the principles announced in *Tatro*. That decision was reviewed and affirmed by a U.S. District Court and the Eighth Circuit Court of Appeals which held that if a service may be performed by someone other than a physician it is not medical. In *Cedar Rapids* the school district did not contend, and the Eighth Circuit did not address, whether the school nursing services requested constituted an "undue burden," financial or otherwise, to the school. In opposing a writ, J.M. contends that, because the Seventh Circuit held that Petitioner Morton would not be burdened, financially or otherwise, by providing the requested services, it decided this case on grounds not inconsistent with the holdings upon which the conflict supporting a grant of certiorari in *Cedar Rapids* was premised, i.e., the

decisions in the Second, Third and Sixth Circuit Courts of Appeal.[3] Respondent J.M. further contends that holding this case for disposition after resolution of the conflict to be resolved in *Cedar Rapids* would not serve the ends of justice, as the outcome would not likely be affected by that decision and delay would cause further harm to him. Petitioner has therefore failed to demonstrate sufficient grounds for certiorari.

B. STATEMENT OF FACTS

J.M. is a fifteen year old boy who lives with his parents in Morton, Illinois, a community in Central Illinois, where he currently attends Morton High School. (App. 65). J.M. moved to the Morton District in 1996 after spending five productive years as a special education student at the Marycrest School in Joliet, Illinois where he was placed by his prior district of residence, the Lisbon Community School District ("Lisbon"), in Kendall County, Illinois. (App. 67). J.M., a student with disabilities, benefits educationally and psychologically from school. (App. 3a). His educational and social progress between 1991 to 1996 is well documented in the record. (App. 67). In order to be in school, J.M. requires assistance from a nurse or other qualified person. He has breathing problems due to chronic fibrotic lung disease, requiring assistance for suctioning of his tracheotomy

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[3] *Detsel v. Board of Education of Auburn Enlarged City School District* 820 F.2d 587 (2nd Cir. 1987); *Fulginiti v. Roxbury Township Public Schools*, 921 F. Supp. 1320 (D.N.J. 1996), aff'd, 116 F.3d 468 (3rd Cir. 1997); and *Neely v. Rutherford County School District*, 68 F.3d 965 (6th Cir. 1995).

and he has corneal abrasions which require hourly eye medication. (App. 66-69). He uses a wheelchair, but he also walks with a walker, vocalizes around his tracheotomy, and is able to feed himself at home and at school. (App. 67-68).

From 1991 to 1996 in his previous home district, J.M. received a range of special education "related services", including physical, occupational and speech therapy, as well as the respiratory and other assistance sought in this action. J.M.'s home district, Lisbon, contracted with a nurse who provided individual supportive services to J.M. at school during a 16 hour school week and during transportation to and from school. (App. 69-70). J.M.'s portable ventilator system (an oxygen trach collar) allowed him to participate in class and maintain respiratory functioning at school. (App. 68). The nurse assisted J.M. at school with procedures that required a total of ten to fifteen minutes, including suctioning of the tracheotomy, administration of eye medication and bathroom transfers. Except for the eye medication, which was administered hourly, these were repeated every two hours. The nurse visually monitored J.M. throughout the four hour school day, but J.M.'s procedures never interrupted class instruction, and, over time, the monitoring became increasingly less intrusive, allowing J.M. to become more and more independent. (App. 70).

When J.M. and his parents moved within Illinois from Lisbon to the Morton District in May, 1996, as a result of an employment transfer, the parents immediately sought to enroll J.M. in school, and they requested the same Individualized Education Plan (IEP), with the

same services that he had consistently received from Lisbon for five years. (App. 66). Morton refused to provide the services of a nurse or any other qualified person to provide the individualized services that J.M. needed to attend school. (App. 63). J.M. and his parents requested a due process hearing in July, 1996 to determine J.M.'s rights under the IDEA. Because J.M. could not attend school without these supportive services, he spent the entire 1996-97 school year in a homebound program with a tutor provided by the school.

J.M. and Morton participated in two levels of administrative review in 1996. The hearing officers in each held the evidence showed that J.M. needed individualized health services in order to attend school, including assessment of his respiratory status with appropriate interventions, administration of hourly eye lubricant, administration of nebulized breathing treatments, monitoring of equipment and other assistance as needed. (App. 69). Each level concluded, as well, that the services required were not excluded medical services, but were health services required to be provided by the School District.

The evidence at the Level I hearing showed that a lay person could be trained to provide the services, and that J.M.'s parents (a school teacher and a computer analyst) learned the procedures in one week of half-day training, and that J.M. did not require a physician's services. (App. 68). After consulting with only one agency, the school district estimated the cost of J.M.'s services at approximately $20,000 per academic year, and its representative testified that providing the services did not impose a financial burden to the School District. (App. 70). Morton

offered no evidence showing that contracting with a trained individual to provide the service was beyond the competence of the Morton District. The evidence at the hearings further established that the requested services did not address either treatment or cure for J.M.'s health conditions, but are maintenance procedures designed to maintain the status quo throughout the day so that he can attend school. (App. 68-69).

J.M. has been seeking the services that are at issue in this case since mid-1996. Despite obtaining two administrative orders and two court decisions in his favor, the services have not been provided by Morton. It is J.M. who has paid for the delay, first by doing without services at all, and subsequently by providing them himself.

REASONS FOR DENYING WRIT

I.

PETITIONER HAS FAILED TO ESTABLISH A BASIS FOR CERTIORARI BECAUSE THE DECISION BELOW DOES NOT PRESENT AN ISSUE OF GREAT IMPORTANCE, OR ON THE EVIDENCE PRESENT, A CONFLICT BETWEEN THE CIRCUITS.

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth those circumstances under which certiorari may be proper, i.e., when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." (Rule 10(a)) or when "a United States court of appeals has decided an

important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10(c)).

The Petitioner has failed to sufficiently identify the conflict in the interpretation of the IDEA in the decision in the case below as contrasted with the decisions in other circuit courts of appeal as required under Rule 10, and the case below does not warrant certiorari because it does not present a direct conflict of authority among the circuits. Nor does it of its own accord present a question of great importance. Although the outcome of the case below is different from the results in *Detsel, Fulginiti* and *Neely,* the decision below is clearly consistent with the reasoning of those cases; it did not depend upon the bright-line test that those decisions rejected. (App. 2a).

The Seventh Circuit decided this case in J.M.'s favor by agreeing that his health services were in fact "related services" under the IDEA because 1) the cost of providing the services was not an undue burden to the School District; 2) the approach used by both hearing officers who decided this issue was consistent with the decision in *Tatro;* and 3) the decisions by both hearing officers to order Morton to provide the services were reasonable, because although "time consuming," the health services required by J.M. did not "cross the line" to become "medical services" as defined by the IDEA and its regulations. (Pet. App. 11a).

The court reviewed at length the School District's argument against providing the services, which amounted to one of undue burden, but could find no evidentiary

basis for the School District to maintain such an argument. (Pet. App. 7a-8a). Writing for the court in the opinion below, Judge Posner observed that Morton made "no effort to show that the expense of a full time nurse for J.M. would be undue in relation to the other calls on the district's budget." (Pet. App. 7a). Such a clear, unambiguous concession that no financial barrier or burden prevented Morton from providing a student services he needed to be in school does not appear in the cases with which Petitioner requests this Court to recognize a conflict. Thus, based on the legal authority cited by the Petitioner, *Detsel*, *Fulginiti* and *Neely*, there is no direct conflict among the circuits which would warrant certiorari.

In sum, although J.M. argued in the Seventh Circuit that the Court of Appeals should adopt the physician/non-physician rule that he contended was required by *Tatro*, the panel found less sweeping reasons for affirming that J.M.'s services were "related services" under the IDEA, as determined by the District Court. (Pet. App. 43a). This precluded the conflict that would have arisen had the Court of Appeals adopted the *Cedar Rapids* rationale for the result it reached. Accordingly, this Court should deny the Petition because the Seventh Circuit's decision is not in conflict with the decisions of any of the other circuits cited by Petitioner.

II.

THERE IS NO REASON TO HOLD THIS PETITION PENDING A DECISION IN *CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT v. GARRET F.*, BECAUSE EVEN IF THIS COURT REJECTS A "BRIGHT-LINE" TEST FOR DETERMINING WHETHER A HEALTH SERVICE IS AN EXCLUDED "MEDICAL SERVICE" UNDER THE IDEA, THE RESPONDENT WOULD PREVAIL BECAUSE THE COURT BELOW HELD THAT THERE WOULD BE NO UNDUE BURDEN IMPOSED BY PROVIDING THE SERVICES.

This Court should deny the Petition outright, and not hold for resolution of the *Cedar Rapids* case. (Pet. App. 7a). Regardless of whether this Court in *Cedar Rapids* interprets the IDEA and its regulations to require otherwise qualifying health related services to be provided whenever they do not require the services of a physician (i.e., the bright-line test), the case below was correctly decided, and no further review is warranted. Respondent would thus prevail because the costs and responsibilities to the Morton District do not unduly burden the School District in this case. The *Fulginiti*, *Neely* and *Detsel* decisions illustrate. The District Court in *Fulginiti* found, and the Third Circuit affirmed without written opinion, that the costs for the student's nursing care at school amounted to an undue burden. 921 F. Supp. at 1325. Similarly, the Sixth Circuit in *Neely* explained that the services themselves were an "undue burden". 68 F.3d at 971. Finally, in *Detsel*, the Second Circuit affirmed a District Court finding that the "medical attention" required by the student was "beyond the competence of a school nurse." 637 F. Supp. 1022, 1026 (N.D.N.Y 1986), *aff'd per curiam*, 820 F.2d 587 (2nd Cir. 1987). Here, there was no

such finding of undue burden by the state hearing officer; indeed both Illinois State Board of Education hearing officers found in this case that J.M.'s tracheotomy care services as well as other one on one assistance commonly provided by schools (for bathroom transfers and other individual assistance necessary during the school day) were "related services" under the IDEA. The Seventh Circuit gave appropriate deference to those decisions.

Morton's clear concession that the services required by J.M. in school were not a financial burden calls for a conclusion that, whether or not this Court affirms the *Cedar Rapids* bright-line test, the decision below in the Seventh Circuit is not an appropriate case for a writ. Moreover, the granting or holding of the Petition would serve only to further postpone the provision of services by the Morton School District, services needed by J.M. to attend and benefit from school.

CONCLUSION

For each of the reasons set forth in the Respondent's brief, this Court should deny the Morton Community School District's Petition for Writ of Certiorari.

Respectfully Submitted,

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No. 98-764

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In The

Supreme Court of the United States

October Term, 1998

MORTON COMMUNITY UNIT SCHOOL DISTRICT NO. 709,

Petitioner,

vs.

J.M., a minor; M.M. and S.M., individually and as parents and next friends of J.M.; and the ILLINOIS STATE BOARD OF EDUCATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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THE FINDING BY THE COURT OF APPEALS THAT THE SCHOOL DISTRICT WOULD SUFFER NO "UNDUE BURDEN" IS IRRELEVANT TO THE ISSUES RAISED BY THE SCHOOL DISTRICT IN ITS PETITION FOR CERTIORARI

Respondent J.M. urges this Court to deny a writ of certiorari because, according to a finding by the Court of Appeals, Petitioner Morton Community Unit School District No. 709 (the "School District") failed to demonstrate that providing full time health care to J.M. while he attended school would impose an "undue burden" on the School District. The following passage from J.M.'s brief succinctly summarizes J.M.'s argument for denial of a writ based upon the finding of no undue burden by the Court of Appeals:

> The Court reviewed at length the School District's argument against providing the services, which amounted to one of undue burden, but could find no evidentiary basis for the School District to maintain such an argument. (Pet. App. 7a-8a). Writing for the court in the opinion below, Judge Posner observed that Morton made "no effort to show that the expense of a full time nurse for J.M. would be undue in relation to the other calls on the District's budget." (Pet. App. 7a). Such a clear, unambiguous concession that no financial barrier or burden prevented Morton from providing a student services he needed to be in school does not appear in the cases with which Petitioner requests this Court to recognize a conflict. Thus, based on the legal authority cited by the Petitioner, *Detsel*, *Fulginiti* and *Neely*, there is no direct conflict among the circuits which would warrant certiorari. (Brief in opposition by Respondent J.M. pages 9-10)

Despite J.M.'s assertions to the contrary, the School District did not argue undue burden to the Court of Appeals. The School District did not argue undue burden because IDEA contains no language which excuses a school district from providing a mandated service merely because that mandated service might be financially burdensome. Consistent with the fact that IDEA contains no defense of undue financial burden, none of the case law interpreting IDEA excuses a school district from providing a service mandated by IDEA solely because that service was expensive. The reverse situation is also true. A school district has no obligation to provide a service which IDEA does not mandate merely because the school district could afford to pay for that service. Consequently, the School District made no effort to show that the expense of a full time nurse for J.M. would be undue in relation to the other calls on its budget, because the extent to which the School District can or cannot afford to pay the cost of a full time nurse for J.M. is irrelevant to the question of whether or not IDEA requires the School District to provide that nurse.

The obligation of the School District to J.M. depends not on the relative expense of the requested service, but on the nature of the service. If the full time health care which J.M. must have qualifies as a "related service" within the meaning of IDEA, then IDEA requires the School District to provide that service regardless of whether or not the provision of that service imposes a significant financial burden on the School District. However, if, as the School District asserts, the full time health care which J.M. requires while attending school falls within IDEA's medical services exclusion, then IDEA excuses the School District from providing that full time health care, even if the $20,000 cost of providing that service is not, in the estimation of the Court of Appeals, an undue burden. Because the School District's obligation to J.M. depends not upon the cost of the services which he requires, but rather on

the nature of those services, the finding by the Court of Appeals that the School District would suffer no undue burden if required to provide full time health care services to J.M. while he attends school is irrelevant to the question of whether or not the School District must provide that health care at its expense.

A fair review of the entire opinion of the Court of Appeals will disclose that the discussion by the Court focuses primarily on the applicability of the medical services exclusion to the full time health care which J.M. requires. The inclusion by the Court of Appeals of a gratuitous finding that the School District would suffer no undue financial burden, particularly where the School District did not assert undue burden as a defense, does not detract from the central issue in this case. That issue, the applicability of IDEA's medical services exclusion to full time health care required by a student while attending school, is precisely the same issue considered in decisions by the various Courts of Appeals cited in the School District's Petition for Certiorari, and precisely the same issue which has led those Courts of Appeals in two separate lines of cases to reach diametrically opposite conclusions. This case squarely presents as its only substantive issue the meaning and extent of IDEA's medical services exclusion. The finding by the Court of Appeals that the School District would suffer no undue financial burden and J.M.'s argument based on that finding should be ignored during this Court's evaluation of the School District's petition for writ of certiorari.

Respectfully submitted,

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